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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, AS ADMINISTRATOR OF THE ESTATE OF NORMAN E. HICKMAN, DECEASED, PETITIONER,

vs.

JOHN M. TAYLOR AND GEORGE ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1946.

CERTIORARI GRANTED MAY 27, 1946.

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RELEVANT DOCKET ENTRIES.

Nov. 26, 1943.	Complaint filed.
Nov. 26, 1943.	Summons exit.
Nov. 26, 1943.	Plaintiff's demand for jury trial filed.
Dec. 1, 1943.	Appearance of Shields, Clark, Brown & McCown, Esqs., for Taylor & Anderson Towing and Lighterage Co., filed.
Dec. 1, 1943.	Appearance of J. F. Shrader, Esq., for B. & O. Railroad Co., filed.
Dec. 8, 1943.	Summons returned "on Nov. 29, 1943 served" and filed.
Dec. 17, 1943.	Answer of B. & O. R. R. Co. filed.
Dec. 29, 1943.	Answer of Taylor & Anderson Towing & Lighterage Co., filed.
Nov. 8, 1944.	Order to place case on the Trial List filed.
Nov. 27, 1944.	Plaintiff's interrogatories to defendants John M. Taylor, et al filed.
Nov. 27, 1944.	Plaintiff's interrogatories to defendant B. & O. Railroad Co. filed.
Dec. 21, 1944.	Answers of Baltimore & Ohio R. R. Co. to interrogatories filed.
Jan. 15, 1945.	Supplemental interrogatories propounded by plaintiff to defendants Taylor & Anderson Towing & Lighterage Co., filed.
Jan. 15, 1945.	Supplemental interrogatories propounded by plaintiff to defendant B. & O. R. R. Co., filed.
Jan. 17, 1945.	Answers of Taylor & Anderson T. & L. Co. to plaintiff's interrogatories filed.

Jan. 25, 1945. Answers of Taylor & Anderson to plaintiff's original and supplemental interrogatories filed.

Feb. 16, 1945. Further answers of Baltimore & Ohio R. R. Co. to interrogatories and answers to supplemental interrogatories filed.

Feb. 26, 1945. Order of Court dated Jan. 15, 1945, requiring defendants to answer certain interrogatories and granting leave to plaintiff to file supplemental interrogatories filed. 2/27/45 Noted.

Feb. 27, 1945. Motion by plaintiff for production of documents and Order of Court granting motion in part filed. 2/28/45 Noted and notice mailed.

Apr. 12, 1945. Hearing sur motion for production of documents.

July 30, 1945. Opinion, of the Court, by Kirkpatrick, J. requiring defendant to answer certain interrogatories and to produce documents filed.

Sept. 5, 1945. Order of Court requiring defendants and their counsel to answer certain interrogatories filed. 9/6/45 noted.

Sept. 5, 1945. Refusal of defendants and Counsel to answer certain interrogatories filed.

Sept. 5, 1945. Order of Court adjudging defendants John M. Taylor and George H. Anderson and their Counsel Samuel B. Fortenbaugh, Jr., to be in contempt of Court and committing them to prison filed. 9/6/45 Noted.

Sept 5, 1945. Notice of appeal filed. 9/5/45 Copy to A. E. Freedman.

Sept. 5, 1945. Order of Court granting supersedeas re: contempt order filed. 9/6/45 Noted.

Sept. 5, 1945. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

Sept. 19, 1945. Deposition of S. B. Fortenbaugh, Jr., filed.

Sept. 20, 1945. Stipulation of counsel as to contents of record on appeal, filed.

Sept. 20, 1945. Statement of S. B. Fortenbaugh, Jr., filed.

COMPLAINT.

(Filed November 26, 1943.)

(1) Defendants John M. Taylor and George H. Anderson, at all times mentioned herein were partners, doing business under the name of Taylor and Anderson Towing and Lighterage Company.

(2) Defendant, Baltimore and Ohio Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Maryland.

(3) At all the times mentioned herein, defendants, John M. Taylor and George H. Anderson owned, operated and controlled the steam tug "J. M. Taylor", engaged in the business of boat towing for hire.

(4) At all the times mentioned herein, defendant Baltimore and Ohio Railroad Company, owned and operated a certain car float, hereinafter referred to, which, upon information, plaintiff avers was identified as car float No. 72.

(5) On or about the 6th day of February, 1943, and at all times mentioned herein, plaintiff's intestate, Norman E. Hickman, was in the employ of defendants John M. Taylor and George H. Anderson, trading as Taylor and Anderson Towing and Lighterage Company, as a member of the crew of the steam tug "J. M. Taylor" in the capacity of a fireman.

(6) On or about the 6th day of February, 1943, defendants John M. Taylor and George H. Anderson, trading as Taylor and Anderson Towing and Lighterage Company, were engaged by defendant, Baltimore and Ohio Railroad Company, to tow the said car float No. 72, from Pier 12, North Wharves in the city of Philadelphia, to a point on the opposite side of the Delaware River and the steam tug "J. M. Taylor" was assigned to perform the said towing job.

(7) On or about the 6th day of February, 1943, the steam tug "J. M. Taylor" commenced to tow the said car float from Pier 12, North Wharves, Philadelphia, out into the Delaware River and while so engaged the said car float foundered and sank.

(8) The line which secured the tug "J. M. Taylor" to the sunken car float remained intact and the tug thereafter continued to be attached to the car float by means of the said line.

(9) Subsequent to the foundering as aforesaid, the said car float rose to the surface several times and on February 7, 1943, at or about 6:00 A. M. o'clock, the car float again rose to the surface beneath the said tug causing the tug to founder and sink to the bottom of the Delaware River.

(10) Plaintiff's intestate, Norman E. Hickman, was carried down with the tug and drowned as a result thereof, after enduring great pain and suffering.

(11) The death of Plaintiff's intestate was due to the negligence of the defendants and the unseaworthiness of the vessels and in failing to take proper precautions to avoid the foundering of the car float No. 72 and of the tug "J. M. Taylor", and in failing to take proper precautions for the safety of the deceased and other members of the crew.

(12) During the period that plaintiff's intestate was employed, he well and truly performed all his duties in a satisfactory manner.

(13) Immediately prior to his death, the decedent was a strong, robust and able-bodied man with the prospect of substantial advancement in earning capacity.

(14) The deceased left surviving him as his heirs at law and next of kin, his father, George E. Hickman, age 57 and his mother, Mary Hickman, age 53.

(15) George E. Hickman, a citizen of the State of Pennsylvania, father of the deceased, was duly appointed administrator of his estate by the Register of Wills of Philadelphia County on November 9, 1943.

FIRST CAUSE OF ACTION.

(16) Plaintiff brings this action on behalf of the persons named in Article (14) hereof under and by virtue of Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. 688).

SECOND CAUSE OF ACTION.

(17) Plaintiff brings this action on behalf of the persons named in Article (14) hereof under and by virtue of the Pennsylvania State Act of 1855 P. L. 309 as amended.

THIRD CAUSE OF ACTION.

(18) Plaintiff also brings this action on behalf of the Estate of Norman E. Hickman, deceased, under and by virtue of the Pennsylvania State Act of 1937 P. L. 2755.

Wherefore George E. Hickman, as administrator of the Estate of Norman E. Hickman, deceased, claims the sum of $100,000.00 damages.

FREEDMAN AND GOLDSTEIN,

By ABRAHAM E. FREEDMAN.

ANSWER OF DEFENDANT, THE BALTIMORE AND OHIO RAILROAD COMPANY.

(Filed December 17, 1943.)

First Defense.

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense.

The plaintiff's decedent had knowledge of and assumed the risks incident to his employment, and the injuries alleged to have been sustained by the plaintiff's decedent arose from and were caused by said risks.

Third Defense.

This defendant, The Baltimore and Ohio Railroad Company, admits the allegations contained in paragraphs 1, 2, 3, 6, 7, and that part of paragraph 4 which avers that this defendant owned the carfloat identified as No. 72; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 8, 9, 10, 12, 13, 14 and 15; denies the remaining allegations of paragraph 4 and each and every allegation of paragraph 11 and denies that the death of plaintiff's intestate was due in any manner to any negligence on the part of this defendant.

Fourth Defense.

And for further defense this defendant avers that at the time of the happening of the accident described in the complaint the said carfloat No. 72 was not in the custody or under the control of this defendant.

J. F. Shrader,
Attorney for the Baltimore and Ohio Railroad Company.

ANSWER OF JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO.

(Filed December 29, 1943.)

(1) Admitted.

(2) Admitted.

(3) It is admitted that John M. Taylor and George H. Anderson, individually, own shares in the steam tug "J. M. Taylor" and that, as a partnership trading as Taylor & Anderson Towing & Lighterage Co. they operated the steam tug "J. M. Taylor" at the times set forth in the Complaint.

(4) Admitted.

(5) Admitted.

(6) Admitted. It is further averred that the Tug "Philadelphia" was also assigned to perform the job of towing the Car Float #72 from Pier 12, North Wharves to the Quigley Shipyard at Cooper's point, Camden, New Jersey, which is approximately on the opposite or New Jersey side of the Delaware River.

(7) and (8). Denied, except as hereinafter averred. On February 8, 1943 at about 4:00 P. M., the Tugs "Philadelphia" and "J. M. Taylor" undertook the towage of the Car Float #72 in accordance with the instructions of the Baltimore & Ohio Railroad. The Car Float #72 had been damaged in manner unknown to the Defendants, Taylor & Anderson Towing & Lighterage Co., and was grounded and filled with water at its berth at Pier 12 when the tugs arrived. The Tug "Philadelphia" put its line to the river end of the car float, which was submerged, and the Tug "Taylor" put its line to the Tug "Philadelphia", and, in this manner, proceeded to tow directly across the river. Finally, however, the car float caught up and one of the two towing hawsers

to the Tug "Philadelphia" parted. Thereupon the Tug "Taylor" returned to Pier 12 for instructions in accordance with which it took over the hawser from the car float to the Tug "Philadelphia". The Tug "Taylor" proceeded to stand watch during the night for the dual purpose of warning other navigation and of protecting the car float against collision damage.

(9) It is denied that the Car float #72 rose to the surface several times prior to 6:00 A. M. on February 7, 1943. It is admitted that shortly before that time the car float did rise to the surface beneath the Tug "Taylor", causing the tug to founder and sink to the bottom of the Delaware River.

(10) It is admitted that the body of Norman E. Hickman was found aboard the tug when she was raised, and that his death was due to drowning.

(11) It is denied that the death of Plaintiff's intestate was due to the negligence of Defendants, Taylor & Anderson Towing & Lighterage Co., or to the unseaworthiness of the Tug "J. M. Taylor", or to any negligence or any actions or omissions on the part of the Defendants, Taylor & Anderson Towing & Lighterage Co., or any officer or member of the crew of the Tug "J. M. Taylor". It is denied that there was any failure to take proper precautions by the Defendants, Taylor & Anderson Towing & Lighterage Co., for the safety of the deceased and other members of the crew.

(12) Admitted.

(13) Defendants, Taylor & Anderson Towing & Lighterage Co., have no knowledge or information or means of obtaining knowledge or information as to the averments of Paragraph (13) and demand due proof thereof upon the trial of this cause.

(14) Defendants, Taylor & Anderson Towing & Lighterage Co., have no knowledge or information or means of obtaining knowledge or information as to the averments of

Paragraph (14) and demand due proof thereof upon the trial of this cause.

(15) Defendants, Taylor & Anderson Towing & Lighterage Co., have no knowledge or information or means of obtaining knowledge or information as to the averments of Paragraph (15) and demand due proof thereof upon the trial of this cause.

(16) Defendants, Taylor & Anderson Towing & Lighterage Co., deny the right of Plaintiff to bring this action and to recover under and by virtue of Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. 688).

(17) Defendants, Taylor & Anderson Towing & Lighterage Co., deny the right of Plaintiff to bring this action and to recover under and by virtue of the Pennsylvania State Act of 1855, P. L. 309 as amended.

(18) Defendants, Taylor & Anderson Towing & Lighterage Co., deny the right of Plaintiff to bring this action and to recover under and by virtue of the Pennsylvania State Act of 1937 P. L. 2755.

WHEREFORE, Defendants, Taylor & Anderson Towing & Lighterage Co., deny the claim of the Administrator of the Estate of Norman E. Hickman, Deceased, in the sum of $100,000., or in any sum whatsoever, and respectfully submit that the Complaint should be dismissed with costs to the Defendants.

SHIELDS, CLARK, BROWN & MCCOWN,

By S. B. FORTENBAUGH, JR.,

Attorneys for John M. Taylor and George H. Anderson, Individually and trading as Taylor & Anderson Towing & Lighterage Co.

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY DEFENDANTS, JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR AND ANDERSON TOWING AND LIGHTERAGE CO.

(Filed November 27, 1944.)

(1) State the date when Norman E. Hickman first entered your employ and set forth the full period of his employment record with you.

(a) State his rating and rate of earnings and the full amount of earnings of the decedent, Norman E. Hickmon, during the period he was in your employ.

(2) State whether Norman E. Hickman satisfactorily performed all of his duties while in your employ. If your answer be in the negative, state in what respects he failed to satisfactorily perform said duties, giving the exact incidents and dates.

(3) State when Norman E. Hickman first became employed aboard the Tug "J. M. Taylor", in what capacity and rate of pay; whether he ate and slept aboard the said vessel and the nature of any voyages or trips made by him on the said vessel.

(4) State whether any shipping articles, agreement or any record was made covering the decedent's employment on the Tug "J. M. Taylor". Attach hereto a photostatic copy of any such shipping articles, agreement or document. If oral, set forth in detail the full and exact nature of any such arrangement.

(5) State to what watch the decedent, Norman E. Hickman, was assigned aboard the Tug "J. M. Taylor".

(6) Set forth the names, addresses and ratings of all of the members of the crews of the Tugs "J. M. Taylor" and "Philadelphia" as of February 6, 1943.

(7) Set forth the nature of the trip which the "J. M. Taylor" had made immediately prior to her undertaking the towing of the car float across the Delaware on February 6, 1943.

(8) State the purpose of and the exact circumstances under which the Tugs "J. M. Taylor" and "Philadelphia" were assigned to tow the car float across the Delaware River on February 6 and 7, 1943.

(9) State what agreement was entered into between you and any other person and/or company for the towing of the car float across the Delaware on February 6 and 7, 1943. If said agreement was in writing, attach hereto a photostatic copy of any such writing or document, specifying also names and adresses of all persons involved in any such agreement. If said agreement was not in writing, state in detail the exact nature of any agreement or understanding, whereby the said car float was to be towed across the river, stating specifically all of the persons and their capacities and addresses who were involved in any such arrangements or who participated in any way in any such arrangements.

(10) State what instructions were given the Captains of the Tugs "J. M. Taylor" and "Philadelphia" relative to the tow of the submerged car float and when and by whom such instructions were given.

(11) State the condition of the car float which was to be towed across the river, how and where it was situated and what method was to be used and the manner in which it was to be towed.

(12) Describe and explain in detail the construction of the car float stating:

(a) The particular devices and means used to provide buoyancy;

(b) The maximum load it was designed to carry;

(c) How much freeboard there was when the car-float was fully loaded and how much when entirely unloaded;

(d) Whether any additional devices were used to provide extra buoyancy when the carfloat was loaded.

(13) Explain how the car float became submerged.

(14) Set forth in detail and verbatim the information or instructions that were given the Captains of the Tugs "J. M. Taylor" and "Philadelphia" with regard to the condition of the car float, the nature and cause of its sinking, stating:

(a) When and by whom such information or instructions were given;

(b) Were either of these Captains informed of the possibility of the submerged car float surfacing? Set forth the nature and details of such information.

(15) State where the said car float was to be towed.

(16) State the points from which the said car float was to be towed to the point of destination.

(17) State whether a diver was sent below to examine the submerged car float or for any other purpose, and attach a photostatic copy of any report he may have submitted or which may have been submitted by anybody based on his examination or relative thereto.

(18) Set forth in detail the circumstances surrounding the commencement of the towing operation:

(a) What facilities or vessels were used;

(b) If hawsers were used, state the manner in which they were secured to the car float and the points at which such hawsers were secured;

(c) State whether the said car float was towed while it was submerged or while it floated on the water;

(d) Set forth the arrangements in detail to be followed in the towing operation, pointing out the part to be played by each of the Tugs "J. M. Taylor" and "Philadelphia", the positions they were to take, the lines each was to secure to the car float.

(e) Set forth the details of any arrangement or agreement between the Captains of the two tugs with relation to this operation.

(f) State whether the said car float came to the surface at any time after being submerged and before the occasion when the Tug "J. M. Taylor" was subsequently overturned. If said car float did come to the surface, on how many occasions did this occur; state the circumstances under which it so arose, the exact times and the periods of time it remained on the surface and the points where it came to the surface.

(19) State whether the towing operation was discontinued before arrival at the destination, and if so, specify the point as closely as possible where said operation was stopped, stating:

(a) The reason therefor;

(b) What was done by each of the Tugs "J. M. Taylor" and "Philadelphia";

(c) Whether the Tug "J. M. Taylor" cast off its lines or maintained connection with the said car float;

(d) At what time and date did the Tug "J. M. Taylor" take up its post with relation to the sunken car float in the stream?

(e) From whom did the Captain of the Tug "J. M. Taylor" receive instructions with regard to the car float which had again submerged in the stream; where and when were such instructions given; and set forth such instructions in detail and verbatim.

(20) If the said Tug "J. M. Taylor" maintained or resumed its connection with the said car float while it was resting on the bed of the river, state:

(a) The nature of the hawsers which connected the two vessels, and where and when such hawsers were secured;

(b) The length of the said hawsers;

(c) Whether the anchor of the Tug "J. M. Taylor" was in the water, and the type of anchor used;

(d) Whether the said Tug "J. M. Taylor" was north or south of the said car float or if said positions cannot be so described, set forth the relative positions of the two vessels;

(e) Whether the Tug "J. M. Taylor" was drifting with the current and tide at the time, and state the direction and speed of the current and tide;

(f) Whether any of the hawsers secured to submerged car float snapped and when and under what circumstances.

(21) State whether any arrangements were entered into with any other person and particularly with the other defendant, the B. & O. Railroad Company, with respect to maintaining the Tug "J. M. Taylor" in the river at the point where the submerged car float appeared to be obstructed in the river. If any new arrangements were entered into, state exactly what such arrangements were and the names and addresses and capacities of all persons who participated in any such arrangements.

(22) State the time as closely as possible, when the Tug "J. M. Taylor" sank in the water.

(23) State in detail all of the circumstances leading up to the sinking of the Tug "J. M. Taylor".

(24) State the facts which resulted in the sinking of the said Tug "J. M. Taylor".

(25) State the cause of the sinking of the Tug "J. M. Taylor".

(26) State whether a diver was sent out to examine the submerged car float or the sunken Tug "J. M. Taylor", giving his name and address. State whether or not he refused to go below at the scene of the sinking and why and whether he subsequently did go below. Attach a copy of any report, memorandum, or statement submitted by him in connection therewith.

(27) State whether the decedent, Norman E. Hickman, was in his bunk and asleep at the time the Tug "J. M. Taylor" sank.

(28) State for how long the decedent, Norman E. Hickman, had been in his bunk prior to the sinking of the Tug "J. M. Taylor".

(29) State in detail what efforts were made to save decedent, Norman E. Hickman, both before and after the tug sank, and when and by whom any such efforts were made.

(30) State whether he was in his bunk at the time the towing operation was undertaken.

(31) State whether any order was given to abandon the vessel "J. M. Taylor" prior to the time it sank.

(32) State whether any warning whatever was given to the decedent prior to the sinking of the said vessel "J. M. Taylor". If any such warning was given, state exactly the nature of any such warning and the name and address of all persons who participated in giving such warning, and the exact time it was given.

(33) State whether Norman E. Hickman was subsequently removed from the said tug and if so, state whether he was found in his bunk.

(34) Did the submerged car float surface or give any indication of an effort to surface while the Tug "J. M.

Taylor" was maintaining a watch in the stream? When, how many times, and with what results?

(35) Did the car float surface at any time after the Tug "J. M. Taylor" sank and before the latter was raised? When and how many times and what were complete circumstances?

(36) State whether the Tug "J. M. Taylor" was subsequently salvaged and if so, specify the date and the persons who participated in the salvaging operation.

(37) State whether any inspection was subsequently made of the "John M. Taylor" after its salvage to determine the cause of the sinking and if so, set forth complete copies of any reports in this connection, or if oral, state the details of any such inspections.

(38) State whether any statements of the members of the crews of the Tugs "J. M. Taylor" and "Philadelphia" or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug "John M. Taylor". Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

(39) State whether there is any ship's log, diary, memorandum, or record maintained by either of the Captains of the Tugs "J. M. Taylor" and "Philadelphia", having any bearing on or connection with this transaction and incident. Attach photostatic copies of such data to your answer.

FREEDMAN AND GOLDSTEIN,

By ABRAHAM E. FREEDMAN.

SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF TO BE ANSWERED UNDER OATH BY THE DEFENDANT, JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO.

(Filed January 15, 1945.)

(1a) State whether you or your representatives have any knowledge or information as to whether any survey, examination or inspection was made of the Tug "J. M. Taylor" after it was raised from the Delaware River.

(2a) State whether you or your representatives have any knowledge or information as to whether any oral or written statements, records, reports or other memoranda were made concerning any matter connected with or arising out of the towing operation, sinking, salvaging and repair of the said tug and car float, the death of the deceased and any other matter related to the accident and incidents involved herein.

(3a) If your answer to (1a) or (2a) be in the affirmative, state:

(a) the names and addresses of all persons or companies who were engaged or involved in the making of all such surveys, examinations and inspections;

(b) whether any records, reports, statements or other memoranda were made or rendered in connection with said examinations within your knowledge or information;

(c) If your answer to subdivision (b) be in the affirmative, set forth:

(1) the nature of each and every such record, report, statement or other memoranda;

(2) the names, addresses, capacity and relationship of every person or company making or

rendering each and every such report, statement, record or other memoranda;

(3) State the name, address, capacity and relationship of every person or company having possession or custody of each and every one of said records, reports, statements or other memoranda.

(4) State the purpose for which each and every such record, report, statement or memoranda was made, the date it was made and the name, address, capacity and relationship of the persons or companies to whom made.

(5) State whether any records, reports, statements or other memoranda are ordinarily or have in the past been required in connection with an accident or disaster. If your answer be in the affirmative, then state what person or persons were ordinarily or have in the past been required to make or render any such records, statements, reports or other memoranda, to whom such records, reports, etc. were required to be made, and describe the nature of such documents.

(6) State whether the statements, records, reports or other memoranda rendered in this case were obtained in the same manner as in the past or if not, state in what way the practice was different.

FREEDMAN AND GOLDSTEIN,

By /S/ ABRAHAM E. FREEDMAN,
Counsel for Plaintiff.

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY DEFENDANTS, JOHN M. TAYLOR AND GEORGE H. ANDERSON, INDIVIDUALLY AND TRADING AS TAYLOR AND ANDERSON TOWING AND LIGHTERAGE CO.

(Filed January 17, 1945.)

Respondents, J. M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing and Lighterage Company, answer and except to the interrogatories propounded on behalf of Libellant as follows:

1. Norman E. Hickman first entered Respondent's employment in September 1939 and continued until February 7, 1943.

(*a*) Norman E. Hickman's rating while employed by Respondents was fireman. His rate of wages was as follows:

1939-41—$110.00 per month
1941-42— 117.50 per month
1942-43— 135.00 per month

The full amount of his earnings while employed by Respondents was $6422.01.

2. While employed by Respondents Mr. Hickman performed his duties as fireman satisfactorily.

3. Mr. Hickman began work on the Tug "J. M. Taylor" on January 22, 1943. His capacity and rate of pay were as set forth in answer to interrogatory #1. While employed on the "J. M. Taylor" Mr. Hickman ate and slept aboard the vessel, both when she was in operation and when tied up at night. At the time of his employment on the "J. M. Taylor" she was engaged in general towage work in the Port of Philadelphia with occasional trips to Baltimore.

4. Mr. Hickman did not sign any shipping articles or written agreement or document of employment. He was hired orally.

5. Mr. Hickman's watch on board the Tug "J. M. Taylor" was from 6 P. M. to 12 midnight.

6. The names, addresses and ratings of all of the members of the crews of the "J. M. Taylor" and "Philadelphia" as of February 6, 1943 were as follows:

Tug "J. M. Taylor":

Captain	Alton Murray Glen Burnie P. O. Marley Park, Md.
Mate	Philip W. West, Jr. 30 S. 22nd St. Philadelphia, Pa.
Engineer	Walter Quillen 5226 Chancellor St., Philadelphia, Pa.
2nd Eng.	John H. Long 5442 Webster St. Philadelphia, Pa.
Cook	Alpheus Dixon 904 S. 46th St. Philadelphia, Pa.
Fireman	Norman Hickman 122 N. Dewey St. Philadelphia, Pa.
Fireman	Andrew Benekos 311 Gaskill St. Philadelphia, Pa.
Deckhand	Olie Knutson 211 Walnut St. Philadelphia, Pa.

Deckhand	Russell Savage 5229 Chancellor St. Philadelphia, Pa.

Tug "Philadelphia":

Captain	Valorous M. Hudson 1101 Longacre Blvd. Yeadon, Pa.
Chief	Esmau Hudson Bishopville, Md.
Fireman	Everett Murray 221 Pine St. Philadelphia, Pa.
Fireman	John Hickman 321 S. 3rd Street Philadelphia, Pa.
Fireman	Preston Long 5300 Delancey St. Philadelphia, Pa.
Deckhand	Frank Bennett 5346 Webster St. Philadelphia, Pa.
Cook	John Lamb 30 School Ave. Upper Darby, Pa.

7. Respondents except to the seventh interrogatory as asking for information irrelevant to the issues raised by the pleadings in this case.

8, 9, 10. On the afternoon of February 6, 1943, Respondents received an order by telephone from Mr. J. H. Murray, General Marine Superintendent of the Baltimore & Ohio Railroad Company, 25 Broadway, New York City, to tow a carfloat from Pier 12, North Wharves, Delaware River, to Quigley's Shipyard, Cooper's Point, Camden, New Jersey. Pursuant to this oral order Respondents dispatched the Tugs "J. M. Taylor" and "Philadelphia" to Pier 12, North

Wharves, to conduct the towing operation in accordance with the orders of responsible agents of the Baltimore & Ohio Railroad at the pier. These instructions were given by George H. Anderson, one of the Respondents, and the captains of the tugs were instructed to report to Mr. J. H. Murray and Mr. Roy Bronski at the pier and tow the carfloat as directed by them.

11. The carfloat, Baltimore & Ohio Railroad No. 72, which was to be towed by the Tugs "J. M. Taylor" and "Philadelphia" on February 6, 1943, on arrival of the tugs, was observed to be submerged at its berth at Pier 12 with the outer river end out of sight under the water. Freight cars were being removed. Respondents knew only that the carfloat was constructed of wood without bulkheads and seemed in all respects of usual type. The manner in which the Tugs "J. M. Taylor" and "Philadelphia" were instructed by Mr. J. H. Murray of the Baltimore & Ohio Railroad to tow the carfloat and the manner in which it was actually towed was as follows: A diver supplied by the Baltimore & Ohio Railroad attached two towing hawsers to the carfloat at the river end. These hawsers were taken by the Tug "Philadelphia" on her stern towing bitts and a line was also run from the bow bitts of the Tug "Philadelphia" to the stern bitts of the Tug "J. M. Taylor". The tow made up in this manner proceeded directly across the river toward its destination.

12, 13. Respondents except to these interrogatories as calling for information of which they do not have knowledge or means of knowledge.

14. The information and instructions given to the captains of the Tugs "J. M. Taylor" and "Philadelphia" with regard to the condition of the car float and the nature and cause of its sinking were received by them from Mr. J. H. Murray of the Baltimore & Ohio Railroad. Captain Alton Murray of the Tug "J. M. Taylor" was simply told that the

car float would rise to the surface when freed from the mud at her berth along the pier. In addition, Mr. J. H. Murray of the Baltimore & Ohio Railroad had informed George H. Anderson, one of the Respondents, by telephone when placing the order for towage that the carfloat was filled with water and was to be towed to the shipyard for repairs.

15. The carfloat was to be towed to Quigley's Shipyard, Cooper's Point, Camden, New Jersey.

16. The carfloat was to be towed from Pier 12, North Wharves, Delaware River, Philadelphia.

17. As stated in the answer to interrogatory #11, a diver supplied by the Baltimore & Ohio Railroad attached the towing hawsers to the submerged river end of the carfloat. Respondents do not have any knowledge or means of knowledge as to whether this diver made any examination of the carfloat or made any report, and accordingly except to that part of this interrogatory asking for this information.

18. a. The Tugs "J. M. Taylor" and "Philadelphia".

b. Two hawsers were attached at the river end to the carfloat on cleats and a bitt.

c. At the commencement of the towage, the shoreward end of the car float was above water, but as soon as pulled clear of the pier the entire float submerged.

d. and e. The arrangements between the captains of the Tugs "Philadelphia" and "J. M. Taylor" were that as soon as the carfloat was towed into the river free of the pier, the "J. M. Taylor" was to let go her hawser to the bow of the "Philadelphia" and come alongside the carfloat and make fast so as to be in a position to handle the carfloat in docking her on arrival at the shipyard. These arrangements could not be carried out for the reasons stated in the answer to interrogatory No. 18 c. as the carfloat was submerged.

f. Respondents do not know of any occasion on which the carfloat came to the surface until after the "J. M. Taylor" sank.

19. The towing operation was discontinued before arrival at destination because the carfloat hung up on an obstruction in the river, presumably the bottom at a point about 200 yards north of the Delaware River Bridge on the eastern side of the channel.

a. The carfloat was on the bottom and could not be towed further.

b, c, and d. After the grounding, the Tug "J. M. Taylor" cast off its line to the Tug "Philadelphia" and returned to Pier 12 to report the situation to the B. & O. employees in charge and receive instructions. The Tug "Philadelphia" in the meantime kept its remaining hawser upon the sunken carfloat, one hawser having parted when the float hung up. At Pier 12 Tug "J. M. Taylor" was ordered to return to the sunken carfloat to relieve the Tug "Philadelphia" and stand by displaying danger signals in order to mark the sunken car float and to protect passing navigation. The Tug "Taylor" took up its position in this manner between 6 and 7 P. M., February 6, 1943.

c. The captain of the "J. M. Taylor" was ordered by Mr. J. H. Murray of the Baltimore & Ohio Railroad to stand by the submerged carfloat.

20. a. The hawser connecting the Tug "J. M. Taylor" to the sunken carfloat was the five inch manila rope which had been one of the towing hawsers of the Tug "Philadelphia".

b The hawser was about 40 fathoms long.

c. No anchor was used.

d. The Tug "J. M. Taylor" was in different positions relative to the carfloat as effected by wind and tide.

e. The Tug "J. M. Taylor", while standing by the sunken carfloat, kept full head of steam on its engine and maneuvered from time to time. The state of tide and speed of current varied from time to time while the "Taylor" was standing by the carfloat.

f. One of the hawsers from the Tug "Philadelphia" to the carfloat broke at the time the carfloat hung up.

21. Information asked for in this interrogatory has been supplied in answer to interrogatory #19 e. No other arrangements were made.

22. The Tug "J. M. Taylor" sank about 6 A. M., February 7, 1943.

23. Shortly before 6 A. M. on February 7, 1943 the Tug "J. M. Taylor" without warning and for an unknown cause took a slight roll. Captain Murray on duty in the pilot house of the Tug, however, alerted the crew, made certain all were on watch and the engines operating and directed the tug forward to test the line to the sunken carfloat. Everything was found in order, but shortly thereafter another slight roll was felt at which time the entire crew was called and immediately thereafter, for causes unknown to the Respondents, the "Taylor" turned over on her starboard side and sank.

24, 25. Respondents do not have knowledge or means of knowledge as to the cause of the sinking of the Tug "J. M. Taylor", except that she was apparently struck from below by the carfloat.

26. On information and belief Philadelphia Derrick and Salvage Company sent a diver out to examine the Tug "J. M. Taylor". Respondents did not receive a copy of any report memorandum or statement submitted by him in connection therewith.

27. On information and belief at the time the Tug "J. M. Taylor" sank, Norman E. Hickman was not in his

bunk, having been called by the mate after the tug took her first roll.

28. On information and belief Norman E. Hickman had been in his bunk from midnight, the time he went off watch, until called prior to the sinking of the Tug "J. M. Taylor".

29. In accordance with established practice under such circumstances, as soon as the crew of the Tug "J. M. Taylor", because of the rolling of the tug, realized that the conditions were abnormal, Norman E. Hickman and the rest of the crew were alerted as stated in the answer to interrogatory #27 but the Tug "J. M. Taylor" sank so rapidly after she started to turn over that there was no time or opportunity for any of the men on deck to take any action to rescue other men as they were all immediately cast into the water.

30. Respondents except to this interrogatory as calling for matter irrelevant to issues raised by the pleadings.

31. On information and belief no order was given to abandon the Tug "J. M. Taylor" prior to its sinking but as set forth in answers to previous interrogatories, as soon as the crew realized that conditions were unusual, the entire crew was alerted and thereafter the Tug "J. M. Taylor" sank immediately.

32. As stated in answers to previous interrogatories, the entire crew, including Norman E. Hickman, was called after the first roll that the Tug "J. M. Taylor" took. This was given by Philip West, Mate, whose address was, on May 4, 1943, 30 South 22nd Street, Philadelphia, Pennsylvania.

33. The body of Norman E. Hickman was subsequently removed from the Tug "J. M. Taylor". It was found on the floor of the forward cabin.

34. While the Tug "J. M. Taylor" was maintaining its watch, the submerged carfloat did not give any indication of an effort to surface and did not surface.

35. After the sinking of the Tug "J. M. Taylor", the carfloat did surface several times but the number is not within the knowledge or means of knowledge of Respondents. On information and belief the carfloat came to the surface some few minutes after the Tug "J. M. Taylor" sank and several times thereafter as reported in newspaper accounts at the time.

36. The Tug "J. M. Taylor" was salvaged by the Philadelphia Derrick and Salvage Company on February 13, 1943.

37. A survey was made of the Tug "J. M. Taylor" after she was hauled out on drydock at the shipyard. Respondents except to that part of [illegible]s interrogatory asking for copies of reports of survey as privileged matter being made in preparation for litigation.

38. Respondents except to this interrogatory as calling for privileged matter obtained in preparation for litigation. Statements were taken.

39. All memoranda or records maintained by the captain of the Tug "J. M. Taylor", her ship's log and diary were lost in the sinking.

SHIELDS, CLARK, BROWN & MCCOWN,

By /s/ S. B. PORTENBAUGH, JR.,
Attorneys for John M. Taylor and George H. Anderson, Individually and trading as Taylor & Anderson Towing & Lighterage Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } *ss.:*

GEORGE H. ANDERSON, one of the Respondents, being duly sworn according to law, deposes and says that the statements of fact contained in the foregoing answers to interrogatories are true and correct to the best of his information and belief.

/s/ GEORGE H. ANDERSON.

Sworn to and subscribed before me this 16th day of January, 1945.

/s/ ANNE E. DONAHUE,
(Seal) *Notary Public.*

My com. exp. 3/21/47.

ANSWERS OF JOHN M. TAYLOR AND GEORGE H. ANDERSON TO ORIGINAL AND SUPPLEMENTAL INTERROGATORIES OF THE PLAINTIFF.

(Filed January 25, 1945.)

7. At 3.15 A. M. on February 3, 1943, the Tug "J. M. Taylor" left the Sinclair Dock at Philadelphia with the Sinclair Oil Barge "No. 1" and arrived at Annapolis, Maryland at 11.15 A. M. The tug left Annapolis on February 5, 1943 at 8.00 A. M. and arrived at Philadelphia at 11.55 P. M. on the same day. The tug was thereafter tied up at Pier 28, South Wharves, Philadelphia until 10.30 A. M. on February 6, 1943, when it was ordered to report at the Baltimore & Ohio Pier No. 12 to remove a derrick hung up on the carfloat. The derrick, however, freed itself before the tug's arrival and the Tug "J. M. Taylor" returned to Pier 28 where it was tied up until it again reported to Pier 12 and undertook the towage as aforesaid.

8, 9 & 10. George H. Anderson, partner in the Defendant firm of Taylor & Anderson Towing & Lighterage Co.,

represented his firm in the telephone conversations with Mr. J. H. Murray on February 6, 1943.

30. Defendants, Taylor & Anderson Towing & Lighterage Co., do not know whether the deceased, Norman E. Hickman, was in his bunk at the time the towing operation was undertaken. Defendants, Taylor & Anderson Towing & Lighterage Co., do know that Norman E. Hickman was standing the watch from 6.00 P. M. to 12 Midnight and from 6.00 A. M. to 12 Noon. The tug was carrying a double crew. Upon information and belief, the deceased was called for breakfast at 5.30 A. M. on the day of his death.

(1a.) Survey was made of the Tug "J. M. Taylor" after it was raised from the Delaware River. There is attached copy of the damage survey on the Tug "J. M. Taylor".

(2a.) Shields, Clark, Brown & McCown, as the legal representatives of the Defendants, Taylor & Anderson Towing & Lighterage Co., interviewed the survivors of the Tug "J. M. Taylor" in the course of their investigation of the accident for the purpose of defending any litigation which might arise therefrom. In addition, a hearing was held before the United States Steamboat Inspectors at which the testimony of all survivors and other witnesses was recorded.

(3a.) The investigation of the sinking of the Tug "J. M. Taylor" on February 7, 1943 was entirely supervised and conducted by counsel for the Defendants, Taylor & Anderson Towing & Lighterage Co. Any and all statements taken were in the course of preparation by counsel for possible litigation. Defendants, Taylor & Anderson Towing & Lighterage Co., except to Interrogatory (3a.) in that it requires the disclosure of entirely irrelevant, immaterial and inadmissible information in an attempt to obtain indirectly counsel's private files. The answering of the very minute and detailed interrogatory would involve practically turn-

ing over not only the complete files, but also the telephone records and, almost, the thoughts of counsel.

SHIELDS, CLARK, BROWN & MCCOWN,
By S. B. FORTENBAUGH, JR.,
Attorneys for John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } *ss.:*

GEORGE H. ANDERSON, being duly sworn according to law, deposes and says that he is one of the partners of the firm of Taylor & Anderson Towing & Lighterage Co., one of the Respondents in the foregoing action; that he has read the foregoing answers to interrogatories, and that the statements contained therein are true and correct to the best of his information and belief.

GEORGE H. ANDERSON.

Sworn to and subscribed before me this 22nd day of January, A. D. 1945.

EMMA B. GANTZ,
Notary Public.

(Seal)

My Commission Expires May 3, 1948.

February 24, 1943

TUG "J. M. TAYLOR"

Damage Survey while Tug on Railway at Kensington Shipyard & Drydock Corporation February 19th, 1943, to ascertain damage alleged to have been sustained through accident February 7th, 1943, in Delaware River opposite Vine Street, Philadelphia.

Rudder and Rudder Post

Rudder broken off at stock and missing.

Stern frame broken at heel where same joins shell plating. Also at top end of stern post.

The rudder to renew in its entirety.

The stern frame to be cut back into the shell and portion of stern frame to renew.

Sea Valves

Open up sea valves for examination, clean out and close up.

Bulwark

Steel bulwark rail dislodged, rail and bulwark stanchions broken—To force back into place and weld.

House side

Indented, starboard side—To release and fair.

Wood Bulkheads

Bulkheads in way of house where distorted to repair.

House Doors

House doors where bent or badly buckled to be faired or part renewed as found necessary and all doors made workable.

Main House Top

To renew from after end of Captain's room to after end of deck house.

Engine Room Skylight

To be renewed in its entirety.

Life Boat

Salvaged life boat to be replaced on top of engine room skylight renewing chocks, grips and complete equipment for boat, also life boat cover.

Boat Davits

The 2 boat davits missing—To renew same including sockets, brackets, guy wires and falls.

House Hand Rails

To renew where missing and repair where bent.

Stack

Salvaged stack to be repaired with part new material and reinstalled and connected to uptakes, renewing guy wires.

Ventilators

Renew boiler room ventilators, cowls, stumps and pipe leading to spaces below.

Revolving vent exhauster from engine room to renew.

Galley Smoke Pipe

To renew, together with deck coaming.

Pilot House and Captain's Room (Wood Construction)

Remove the remaining parts of the pilot house and Captain's room and reconstruct complete new pilot house and Captain's room, together with all missing furniture and fittings.

Masts

Foremost and mainmast missing—To renew in their entirety with stays.

Steering Gear Controls

The stand in the pilot house and control rods leading to engine to be overhauled, repaired, realigned and put in operating condition.

The after steering stand to repair, resecure, and connect control rods as before.

Side Light Boxes

Missing—To renew.

Bell Pulls and Voice Tubes

Repair bell pulls and speaking tubes as found necessary, renewing any missing parts.

Searchlight.

Searchlight missing—To renew, operated from inside of pilot house.

Galley

All wood work in galley where distorted to be repaired as found necessary and missing parts of galley stove renewed.

Forward Quarters

Repair wood work and berths as necessary.

Engineer's Quarters, Aft

Remove wood work and berths and repair or renew as necessary.

Steering Gear

Open up steering engine, rods, chains and sheaves leading aft, examine, overhaul and repair as found necessary and relag cylinder.

Machinery

Open up all machinery for examination, clean and if found in order, close up.

Generator (Moon)

Take Turbo Generator to shop, overhaul, bake out armature and coils, repair, test out and prove in good order.

Electrical Work

Test out all electrical wiring and fittings and place same in good order including switchboard and navigation lights.

Heating System

Repair and renew radiators and piping leading to same as found necessary to put same in proper operating condition.

Boilers

Open up boilers and mountings, clean water and fire sides and apply working pressure hydrostatic test for U. S. Locals. Close and fill boiler ready for steam.

Uptakes

Uptakes where damaged to be faired, repaired with part new material as necessary ready to reinstall stack.

Asbestos Lagging

Renew asbestos lagging on boiler and where missing on piping.

Steam and Water Piping

To be tested out, cleaned and proven in good order.

Floor Plates

Replace floor plates where dislodged.

Cleaning

The entire vessel to be cleaned, removing mud from all bilges and upon completion of repairs to be left clean and in orderly condition.

Painting in General

All new and disturbed work to be painted as originally.

Coal

Remove approximately 20 tons of coal from bunkers and afterwards replace.

Removals

Necessary removals to effect repairs to be reinstalled.

Drydocking

Necessary to effect above repairs.

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO BE ANSWERED BY THE B. & O. RAILROAD CO. UNDER OATH.

(Filed November 27, 1944.)

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(1) State the time when and the circumstances under which the car float involved in the instant case was first submerged in the water.

(2) State whether the said car float was loaded when it submerged and exactly what the said load consisted of. What arrangements were made for the removal of the load before the car float was to be towed and was the load removed? If so, when?

(3) State whether or not a diver was sent below to examine the submerged float and to attach lines thereto and who arranged for this to be done. Set forth the results of the diver's examination and give the name and address of the diver. Attach to your answer hereto a copy of any report, memorandum, or statement made by the diver or on his behalf.

(4) State whether the said car float required any repairs at that time and if so, state the nature of any such repairs and what arrangements were entered into for effecting such repairs.

(5) State whether any arrangements or agreements, oral or written, were entered into for the towing of the said car float across the river and to any specified destination. State exactly the nature of such arrangements, when and by whom such arrangements were made, giving the names and addresses of all persons who entered into said arrangements and understandings. If written, attach a copy thereof to your answer hereto.

(6) State whether the said car float was submerged or was afloat in the water prior to its being towed.

(7) State whether you or any of your representatives participated in the actual towing or gave any instructions whatever in connection with the towing of the said car float across the river. If your answer be in the affirmative, state in detail all such instructions and participation, giving the names and addresses of all persons involved.

(8) State whether any of your representatives, or anybody on your behalf, was on the scene during any part of the towing operations. Did such observer submit any report or memo? Attach a copy thereof to your answer hereto.

(9) State whether one or more vessels were used to tow the said car float across the river, giving the names of the said vessels.

(10) State whether the said car float came to the surface at any time prior to the occasion when the Tug "J. M. Taylor" was subsequently overturned. If so, state the point at which it so came to the surface, the exact time and the period of time it remained on the surface and whether it again sank.

(11) State whether the said car float subsequently became stuck in the river. If so, state the place and time when same took place.

(12) State whether you were advised that the car float was stuck in the river, whether you were asked for further instructions, and by whom. State exactly what said request was, and if you gave any further instructions or advices, state exactly what such instructions and advices were and the names and addresses of all persons who participated in said arrangements and who rendered such instructions and advices.

(13) State whether you ordered or authorized the Tug "J. M. Taylor" to stand by the car float after it was stuck in the river, and detail the exact instructions given in this connection.

(14) State whether the car float subsequently overturned the Tug "J. M. Taylor". If the Tug "J. M. Taylor" was overturned because of some other fact, explain in detail such other fact or cause.

(15) State whether a diver was sent out to examine the submerged car float or the sunken Tug "J. M. Taylor", giving his name and address. State whether or not he refused to go below at the scene of the sinking and why and whether he subsequently did go below. Attach a copy of any report, memorandum, or statement submitted by him in connection therewith.

(16) State the exact size, weight and construction of the said car float. Attach hereto a drawing or blueprint of said car float, showing its construction, and if you are possessed of any photograph of said car float, attach hereto a copy of said photograph or advise where same can be inspected.

(17) Describe and explain in detail the particular devices and means used to provide buoyancy for the car float, stating:

(a) the maximum load it was designed to carry;

(b) how much freeboard there was when the car float was fully loaded and how much when entirely unloaded;

(c) whether any additional devices were used to provide extra buoyancy when the car float was loaded.

(18) When and by whom was this car float built, and when and from whom was it purchased by you?

(19) State from any knowledge or information in your possession the reason for the bobbing up of the car float on the different occasions prior to and subsequent to the sinking of the "J. M. Taylor".

(20) Attach hereto copies of any memoranda, reports or statements available to you or in your possession, relating to the towing, bobbing or sinking of the car float or in connection with the sinking of the Tug "J. M. Taylor".

FREEDMAN AND GOLDSTEIN,

By /s/ ABRAHAM E. FREEDMAN.

SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF TO BE ANSWERED UNDER OATH BY THE DEFENDANT, B. & O. RAILROAD CO.

(Filed January 15, 1945.)

(1a) State whether you or any of your representatives have any knowledge or information as to whether any surveys, examinations or inspections were made of the car float before the towing operation was begun at any time thereafter, while the float was submerged or after it was raised from the water after the accident whereby the Tug "J. M. Taylor" was sunk.

(2a) State whether you or your representatives have any knowledge or information as to whether any oral or written statements, records, reports or other memoranda were made concerning any matter connected with or arising out of the condition of the float, its submerging and the cause of the submerging before the towing operation began; arising out of the towing operation; the sinking, salvaging and repair of the said car float after the towing operation was begun; relating to the bobbing up and submerging of the float while in the Delaware River after the towing operation was begun; relating to the death of the deceased and any other matter related to the accident and incidents involved herein.

(3a) If your answer to (1a) or (2a) be in the affirmative, state:

(a) the names and addresses of all persons or companies who were engaged or involved in the making of all such surveys, examinations and inspections;

(b) whether any records, reports, statements or other memoranda were made or rendered in connection with said examinations within your knowledge or information;

(c) if your answer to subdivision (b) be in the affirmative, set forth:

(1) the nature of each and every such record, report, statement or other memoranda;

(2) the names, addresses, capacity and relationship of every person or company making or rendering each and every such report, statement, record or other memoranda;

(3) State the name, address, capacity and relationship of every person or company having possession or custody of each and every one of said records, reports, statements or other memoranda.

(4) State the purpose for which each and every such record, report, statement or memoranda was made, the date it was made and the name, address, capacity and relationship of the persons or companies to whom made.

(5) State whether any records, reports, statements or other memoranda are ordinarily or have in the past been required in connection with an accident or disaster. If your answer be in the affirmative, then state what person or persons were ordinarily or have in the past been required to make or render any such records, statements, reports or other memoranda, to whom such records, reports, etc. were required to be made, and describe the nature of such documents.

(6) State whether the statements, records, reports or other memoranda rendered in this case were obtained in the same manner as in the past or if not, state in what way the practice was different.

FREEDMAN & GOLDSTEIN,

By /s/ ABRAHAM E. FREEDMAN,

Counsel for Plaintiff.

ANSWERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY UNDER OATH TO THE INTERROGATORIES PROPOUNDED BY THE PLAINTIFF.

(Filed December 21, 1944.)

1. Answering the first interrogatory, this defendant says, in the early morning of February 5, 1943 on the north side of Pier 12, Philadelphia.

2. Answering the second interrogatory, this defendant says the car float was loaded with five empty refrigerator cars and one empty box car. Defendant employed the Philadelphia Derrick & Salvage Corporation to remove the cars from the float while she was in her submerged condition and that corporation finished removing all cars on the evening of February 6.

3. Answering the third interrogatory, this defendant is informed that a diver was sent below to examine the submerged float; but this was not done by this defendant, and this defendant is ignorant as to what were the results of the diver's examination, and does not know the name or address of the diver. No report, memorandum or statement made by the diver or on his behalf was furnished to this defendant.

4. Answering the fourth interrogatory, this defendant says, that no repairs were made to the float before she was towed away from Pier 12.

5. Answering the fifth interrogatory, this defendant says that on February 6 before the Philadelphia Derrick & Salvage Corporation had finished taking the cars from the float, Mr. J. H. Murray, this defendant's Superintendent of Marine Equipment, by telephone, employed defendant, Taylor & Anderson Towing & Lighterage Corporation to tow the car float from Pier 12 to the Quigley Shipyard, Inc. at Coopers Point, Camden, New Jersey, the same to be done when the Philadelphia Derrick & Salvage Corporation had finished taking the cars from the float. Mr. Murray made the arrangements over the telephone with George H. Anderson of Taylor & Anderson Towing & Lighterage Corporation and the agreement was to tow the car float with her decks awash from Pier 12 to said shipyard.

6. Answering the sixth interrogatory, this defendant refers to its answer to the fifth interrogatory and says that the car float was partly submerged with decks awash when the towing was begun.

7. Answering the seventh interrogatory, this defendant says, "no". It employed defendant, Taylor & Anderson Towing & Lighterage Corporation as an independent contractor to tow the float from Pier 12 to the Quigley Shipyard, Inc.

8. Answering the eighth interrogatory, this defendant says, "no", except that Mr. J. H. Murray was on Pier 12 when the towing was begun and for a short time thereafter. This defendant excepts to that part of the eighth interrogatory which requests the production of reports, memoranda or statements made by this defendant's employees after the happening of the accident.

9. Answering the ninth interrogatory, this defendant says that Taylor & Anderson Towing & Lighterage Corporation used their tugs PHILADELPHIA and the J. M. TAYLOR.

10. Answering the tenth interrogatory, this defendant says it doesn't know.

11. Answering the eleventh interrogatory, this defendant says it has no definite knowledge on the subject as the float was in the exclusive possession and control of Taylor & Anderson Towing & Lighterage Corporation.

12. Answering the twelfth interrogatory, this defendant says that while Mr. J. H. Murray was still standing on Pier 12 the tug J. M. TAYLOR returned to the pier and her master informed Mr. Murray that one of the two lines to the float had parted from chafing and that the float, entirely submerged, was stuck on the bank of the channel about 1,000 feet off the Camden shore. The master of the tug J. M. TAYLOR, an employee of Taylor & Anderson Towing & Lighterage Corporation, whose name was Alton Murray, then suggested to Mr. J. H. Murray that it would be well to have a tug stand by the wreck during the night. Mr. J. H. Murray then suggested that Mr. Alton Murray talk with his superior Captain Anderson of Taylor & Anderson Towing & Lighterage Corporation. Thereupon Mr. Alton Murray, the master of the tug J. M. TAYLOR, telephoned to his superior, Captain Anderson, and Captain Anderson later talked with Mr. J. H. Murray. Captain Anderson told Mr. J. H. Murray that in his opinion it was safe to have a tug stand by the sunken float to warn navigation, and Captain Anderson also told Mr. J. H. Murray that he thought it better to have a tug stand by than to arrange to anchor and buoy the float. Captain Anderson then said to Mr. J. H. Murray that if the Railway Company would pay the expense of the service, he would arrange to have one of his tugs stand by the sunken float. This conversation between Mr. J. H. Murray and Captain Anderson was by telephone, and after Captain Anderson had agreed to have one of his tugs stand by the float, Mr. J. H. Murray turned the telephone over to Mr. Alton Murray, the master of the tug J. M. TAYLOR, and when Mr. Alton Murray finished talking with Captain Anderson, he informed Mr. J. H. Murray that Captain Anderson had ordered him and his tug, the J. M. TAYLOR, to relieve the tug PHILADELPHIA

and to stand by the float throughout the night. And about 6 P. M. the tug J. M. TAYLOR left Pier 12 presumably to relieve the PHILADELPHIA and stand by the float during the night.

13. Answering the thirteenth interrogatory, this defendant refers to its answer to the twelfth interrogatory.

14. Answering the fourteenth interrogatory, this defendant says it has no definite knowledge on the subject as the car float was in the exclusive possession and control of Taylor & Anderson Towing & Lighterage Corporation.

15. Answering the fifteenth interrogatory, this defendant says that on February 8, Mr. J. H. Murray communicated with the Philadelphia Derrick & Salvage Corporation in an effort to have them raise the float and move her to Quigley Shipyard, Inc. On February 11 that corporation raised the tug J. M. TAYLOR and on February 15 it raised the float and on February 16 the float with the derricks which were holding her were towed to Quigley's Shipyard, Inc. by two tugs of Taylor & Anderson Towing & Lighterage Corporation. Defendant has no definite knowledge as to whether the Philadelphia Derrick & Salvage Corporation used a diver in the matter of raising the float.

16. Answering the sixteenth interrogatory, this defendant says that The Baltimore and Ohio Railroad Company car float No. 72 was 220 feet long, by 34 feet wide by 9 feet deep; total weight, approximately 500 to 600 tons, closest figured weight, 574 tons. It is of wooden construction, five fore and aft bulkheads constructed of 8 by 12 yellow pine. No blueprint or drawing is available, having long since been destroyed. There are no photographs of float available.

17. Answering the seventeenth interrogatory, this defendant says that The Baltimore and Ohio Railroad Company car float No. 72 was (a) designed to carry a maximum load of 500 tons, (b) approximately 4 feet freeboard when

fully loaded, and 6 feet freeboard when light or unloaded. (c) Vessel as constructed provided own buoyancy. No extra buoyancy needed when float loaded.

18. Answering the eighteenth interrogatory, this defendant says that The Baltimore and Ohio Railroad Company car float No. 72 was purchased from Robert Palmer & Son, Noank, Connecticut, and delivered at Philadelphia, Pa., in September, 1905.

19. Answering the nineteenth interrogatory, this defendant has no knowledge on the subject. The float was in the exclusive possession and control of Taylor & Anderson Towing & Lighterage Corporation.

20. Answering the twentieth interrogatory, this defendant excepts to the production of statements and reports of all its employees made and given after the accident, the only ones this defendant has.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By (Sgd.) P. J. HENRY.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

P. J. HENRY, being duly sworn according to law, deposes and says that he is Division Claim Agent of The Baltimore and Ohio Railroad Company, one of the defendants above named, and that the foregoing answers to Interrogatories are true and correct to the best of his knowledge, information and belief.

(Sgd.) P. J. HENRY.

Sworn to and subscribed before me the 20th day of December, 1944.

(S.) ETHEL S. SMITH,
Notary Public.

(Seal)

My Commission Expires February 3, 1945.

FURTHER ANSWERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY TO ORIGINAL INTERROGATORIES, AND ANSWERS TO SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF.

(Filed February 16, 1945.)

4. Further answering the Fourth Interrogatory, this Defendant says that this Interrogatory taken in connection with the Third Interrogatory calls for information in respect to the float before she was towed from Pier 12. As stated in the Answer to the Fifth Interrogatory, this Defendant employed Taylor & Anderson Towing & Lighterage Company to tow the float from Pier 12 to the Quigley Shipyard Inc. The float having sunk naturally, this Defendant assumed that there was some reason for it and in order to determine the reason or cause and to correct the same, this Defendant employed Taylor & Anderson Towing & Lighterage Company to tow the float to the shipyard. It was impossible for this Defendant to know at that time what, if anything, was wrong with the float or whether or not she needed any repairs. No repairs were made to the float before she was towed from Pier 12 to the Quigley Shipyard and it was not necessary to make any as it is a common practice to tow partly submerged car floats and other similar craft.

13. Further answering the Thirteenth Interrogatory, this Defendant says that it did not order or authorize the tug J. M. Taylor to stand by the car float after it was stuck in the river. It neither authorized nor ordered the tug J. M. Taylor to do anything. This Defendant did not agree to pay the Taylor & Anderson Towing & Lighterage Company for the services of a tug to stand by and watch the float but Mr. J. H. Murray did tell Captain Anderson that its insurance company or underwriters would pay for the services.

Mr. J. H. Murray's reply to the statement of Captain Anderson as set forth was that as he, Captain Anderson, had more knowledge of the river and had towed so many of the railroad company's floats in their sunken condition before, he would abide by his, Captain Anderson's, judgment. Mr. J. H. Murray did not agree that it was safe to have a tug stand by the sunken float and he did not agree that it was better to have a tug stand by than to arrange to anchor and buoy the float. He employed Taylor & Anderson Towing & Lighterage Company to perform the service of marking and watching the float as in their judgment it should be performed.

15. Further answering the Fifteenth Interrogatory, this Defendant says that some time after the float had been raised and towed to the Quigley Shipyard Inc. it received a bill from the Philadelphia Derrick & Salvage Corporation for raising the float and in this bill this Defendant was charged for the services of a diver.

16. Further answering the Sixteenth Interrogatory, this Defendant says that the float is in constant use at the port of Philadelphia and, therefore, it is impossible to say just where she will be at a particular time. But if the attorney for the Plaintiff will communicate with the attorney for the Defendant, a time and place for the examination and inspection of the float will be arranged. If plaintiff should desire to communicate direct with the railroad company in respect to a time and place for an inspection, he may do so by calling Rittenhouse 4500, Extension 37 A which is the telephone number of the barge office on Pier 68.

This Defendant says that at no time were any devices or means used to provide buoyancy for the car float.

ANSWERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY TO SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF.

(1a) Answering the Supplemental Interrogatory known as (1a) this Defendant says that no surveys, exami-

nations or inspections were made of the float before the towing operation was begun from Pier 12, but after the float had arrived at the Quigley Shipyard Inc. the customary survey was held.

(2a) Answering the Supplemental Interrogatory known as (2a) this Defendant says that written reports or memoranda were made.

(3a) Answering Supplemental Interrogatory known as (3a) this Defendant says:

(a) To this Defendant's knowledge or information the only examination, inspection or survey of the float was made on February 25, 1943 while she was on the railway at Quigley Shipyard Inc. This was a customary survey and the surveyors who attended part in it were:

John G. Howard,
c/o Baltimore and Ohio Railroad Company,
Pier 62 South,
Philadelphia, Pa.

George S. Bugg,
c/o Quigley Shipyard Inc.,
Coopers Point,
Camden, New Jersey

O. C. Chapman,
328 Chestnut Street,
Philadelphia, Pa.

J. H. Murray,
c/o Baltimore and Ohio Railroad Company,
25 Broadway,
New York, N. Y.

(b) No, except that Quigley Shipyard Inc. performed the work as outlined in the survey report and that bill was more or less itemized.

(c) (1) Bill of Quigley Shipyard Inc. referred to above.

(2) The address of Quigley Shipyard Inc. is Coopers Point, Camden, New Jersey.

(3) Mr. P. C. Garrett, General Claim Agent, Baltimore and Ohio Railroad Building, Baltimore, Maryland, and Mr. J. H. Murray, Superintendent Floating Equipment, 25 Broadway, New York, New York. Copies may be found from time to time in other departments of the railroad company at its main building in Baltimore.

(4) The Survey report above referred to was dated February 25, 1943. The bill rendered by Quigley Shipyard Inc. was dated February 22, 1943. A bill was rendered by Philadelphia Derrick & Salvage Corporation February 25, 1943, and a bill was rendered by Taylor & Anderson Towing & Lighterage Company, the same being dated February 26, 1943. On March 6, 1943, Mr. J. H. Murray made a written report to Mr. J. W. Van Horn and Mr. F. G. Hoskins of the railroad company. And on March 25, 1943, Mr. B. F. Levy, Division Accountant, made a report in respect to the expense involved which he supplemented on July 2, 1943. These surveys, reports, etc., were naturally made to determine what, if anything, was wrong with the float, what repairs, if any, were necessary, the cost involved and the necessary bookkeeping entries to be made by the railroad company.

(5) This case was handled in the same manner as similar cases have been handled in the past.

(6) Refer to 5 above.

HOWARD BURTT,
Attorney for The Baltimore and Ohio Railroad Company.

P. J. HENRY,
Division Claim Agent.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss:*

P. J. HENRY, being duly sworn according to law, deposes and says that he is Division Claim Agent for The Baltimore and Ohio Railroad Company, one of the defendants above named, and that the foregoing answers to Interrogatories are true and correct to the best of his knowledge, information and belief.

P. J. HENRY.

Sworn to and subscribed before me the 14th day of February, 1945.

ETHEL S. SMITH,
(Seal) *Notary Public.*
My Commission Expires February 3, 1949.

ORDER.

(Filed February 26, 1945.)

AND NOW, to wit, this 15th day of January, 1945, upon Motion of Messrs. Freedman and Goldstein, counsel for the plaintiff in the within matter, and after due notice to all the parties, it is hereby Ordered, Adjudged and Decreed as follows:

With Respect to the Defendant, Taylor & Anderson Towing & Lighterage Co.

(1) Defendant is required to answer fully the 7th interrogatory propounded by plaintiff.

(2) Defendant is required to state the name and capacity of the person representing this defendant in making the arrangements with the other defendant for the towing of the car float as required in the plaintiff's 8th, 9th and 10th interrogatories.

(3) Defendant is required to answer the plaintiff's 30th interrogatory.

(4) Leave is granted to plaintiff to file supplemental interrogatories as to this defendant.

With Respect to the Defendant, B. & O. Railroad Co.

(5) This defendant is required to specifically answer the 4th interrogatory and state whether the car float required any repairs before it was towed across the river, the nature of any such repairs and what arrangements were entered into for effecting such repairs.

(6) This defendant is required to answer the 13th interrogatory specifically whether it ordered or authorized the Tug "J. M. Taylor" to stand by the car float after it was stuck in the river; whether this defendant at any time agreed to pay for the services of the tug in standing by as set forth in the 12th answer to plaintiff's interrogatories; state what reply J. H. Murray made to the following statement of Captain Anderson set forth in the 12th answer to plaintiff's interrogatories as follows: "Captain Anderson told Mr. J. H. Murray that in his opinion it was safe to have a tug stand by the sunken float to warn navigation, and Captain Anderson also told Mr. J. H. Murray that he thought it better to have a tug stand by than to arrange to anchor and buoy the float." Whether J. H. Murray agreed with Captain Anderson that it was safe to have a tug stand by the sunken float and whether he agreed that it was better to have a tug stand by than to arrange to anchor and buoy the float.

(7) This defendant is required to state all knowledge or information, "definite" or "indefinite" concerning the use of a diver in the matter of raising the float as referred to in the 15th interrogatory.

(8) This defendant is required to state where the float may be inspected and examined as required by the 16th interrogatory.

(9) This defendant is required to deseribe and explain in detail the particular devices and means used to provide buoyancy for the car float; and whether any additional devices were actually used to provide buoyancy.

(10) Leave is granted to plaintiff to file supplemental interrogatories as to this defendant.

/s/ KIRKPATRICK,
U. S. District Judge.

MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE 34.

(Filed February 27, 1945.)

Plaintiff, by his counsel, Messrs. Freedman and Goldstein, moves Your Honorable Court for an Order requiring defendant, B. & O. Railroad Company, to produce and permit plaintiff to inspect and copy each of the following documents:

(1) The bills, memorandum and report of the Philadelphia Derrick & Salvage Corporation in connection with the raising and working on the float involved herein;

(2) The bills, statements and reports of John G. Howard, George S. Bugg, O. C. Chapman, J. H. Murray in connection with the matters involved herein;

(3) The survey reports of the float;

(4) Bill of Quigley Shipyard, Inc.;

(5) Bill rendered by Taylor & Anderson;

(6) Report of J. H. Murray to Mr. J. W. Van Horn and F. G. Hoskins, B. F. Levy.

Defendant, B. & O. Railroad Company, has the possession, custody and control of each of the foregoing docu-

ments. Each of them constitutes or contains evidence relevant and material to a matter involved in this action.

FREEDMAN AND GOLDSTEIN,

By /s/ ABRAHAM E. FREEDMAN.

ORDER.

AND Now, to wit, this 27th day of February, 1945, upon Motion of Messrs. Freedman and Goldstein, counsel for the within plaintiff, it is Ordered, Adjudged and Decreed that the defendant, Baltimore & Ohio Railroad Company, do produce and permit plaintiff to inspect and copy each of the following documents:

(1) The bills of the Philadelphia Derrick & Salvage Corporation in connection with the raising and working on the float involved herein;

(3) The survey reports of the float;

(4) Bill of Quigley Shipyard, Inc.;

(5) Bill rendered by Taylor & Anderson;

(6) Report of J. H. Murray to Mr. J. W. Van Horn and F. G. Hoskins, B. F. Levy,

/s/ KIRKPATRICK,

U. S. District Judge.

DEPOSITION OF S. B. FORTENBAUGH, JR.

(Filed September 19, 1945.)

Deposition of S. B. FORTENBAUGH, JR., ESQ., taken in the Chambers of the Honorable William H. Kirkpatrick, Judge, United States Court House, 9th and Chestnut Streets, Philadelphia, Pa., on April 5, 1945, at 2:50 o'clock.

Present: HON. WILLIAM H. KIRKPATRICK, J.
ABRAHAM E. FREEDMAN, ESQ.
S. B. FORTENBAUGH, JR., ESQ.

This deposition is taken in connection with the 38th interrogatory originally filed by Abraham E. Freedman, Esq., the said interrogatory reading as follows:

> "State whether any statements of the members of the crews of the tugs 'J. M. Taylor' and 'Philadelphia', or of any other vessel, were taken in connection with the towing of the car float and the sinking of the tug 'J. M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statement or reports."

It is agreed that this deposition shall supplement the statement of Mr. Fortenbaugh filed April 5, 1945, and that the two together shall be considered as a part of the record in the above entitled cause, upon which the Court may make a ruling on Mr. Freedman's interrogatories and request for production of documents filed in this matter.

S. B. FORTENBAUGH, JR., ESQ., was examined and testified as follows:

DIRECT EXAMINATION,

By THE COURT:

Q. Now, Mr. Fortenbaugh, you represented Taylor and Anderson on a general retainer on or about February 10, 1943; you were their general counsel?

A. Not on a retainer basis, but I have represented Taylor and Anderson for a great many years.

Q. In other words, you considered them clients of yours?

A. That is correct.

Q. You didn't have an annual retainer from them?

A. That is correct.

Q. Did you attend the United States Steamboat Inspector's investigation to which you refer in your statement of March 4, 1943?

A. I did not personally attend it, but somebody from my office did.

Q. Had suits been brought by any of the four of the five deceased local representatives with whom you settled?

A. With one exception, they were all represented by counsel who made demand on Taylor and Anderson, but I do not believe that any suit was actually started—there may have been one.

Q. Can you give me any idea as to the dates when settlements were made in these cases? It is not mentioned in your statement.

A. I will be glad to take from my files the exact dates when we obtained the releases, but I believe the first one was made approximately four months after the accident, and the others were made at intervals of a couple months thereafter.

Q. Had all of the settlements been made by November 26, when Mr. Freedman commenced this present action, as well as you can remember?

A. With one possible exception, and that exception was settled either just before or just after Mr. Freedman's action.

Q. Now, am I to understand from what you told me, just before this deposition was taken, that Taylor and Anderson is a comparatively small concern, is that right?

A. Yes, sir.

Q. And how many tugs do they own?

A. They own and operate seven tugs. As far as the port of Philadelphia is concerned, they have about as large a volume of business as any towing concern.

Q. I also understand they did not have any regular claims department of their own.

A. That is correct.

Q. They have no officer or employee who corresponds in any way with a claim agent of a large corporation?

A. That is correct. The form of organization is that of a partnership consisting of John M. Taylor and George H. Anderson, and their entire office force consists of a dispatcher and possibly two on the clerical staff.

Q. All the other employees are actually operating seamen or masters of tugs, or men of that kind?

A. That is correct. I presume there is some fluctuation in the number in the office, but generally it is small.

Q. They do not employ any investigator?

A. That is correct.

Q. You have referred in your statement to the fact that you interviewed all four surviving members of the crew and took their statements. Can you tell me about when these interviews took place and the statements were taken? Were they taken immediately after the accident?

A. They were taken very shortly after the accident. The survivors were in the hospital for various times, as I recall it, and I believe the statements were taken directly after the steamboat inspector's hearing, and that, as is very usual in these cases, they were not signed for until some

time thereafter, because of the inability to locate them. I can, of course, ascertain from my file exactly those dates.

Q. Perhaps we might have you add these later on. Can you also ascertain from your files the dates when demands were made by any of the representatives of the survivors? In other words, what I would like to get at, although I say now I don't consider it a conclusive factor in the case, but I would like to know whether the statements were taken by you before claim had been made, actually presented, in behalf of any of the deceased seamen.

A. One of the deceased seamen was represented at the steamboat inspector's hearing. My recollection is, the statements were taken after that date; they were taken, undoubtedly, before Mr. Freedman's demand.

Q. Oh, yes; I would just like to know how they fit in with the other three.

A. I will be very glad to give you a schedule when the claims were filed.

Q. And when the statements were taken?

A. Yes.

Q. I would be very glad to have ~~that; I think~~ that would help.

Also, while you do not say so in your statement, I understand from what you told me that you interviewed a number of persons other than the actual survivors of the crew.

A. That is correct.

Q. And they made oral statements to you, which were, in some way, in your judgment, relative to the issues in this case?

A. I, and others in my office, did interview a number of people with the idea of developing the cause of the accident in question.

Q. By the way, did you make a memorandum of the interviews? I understand from what you said you didn't take any other written statement, signed statements?

A. I believe that is the case. I did not take any signed statements—I certainly took memoranda.

Q. So that you could, probably, by looking at the files, give me an idea of the dates or the period of time during which you were taking these statements? If you can, I would be glad to have you do that.

A. As is usual, most of the examination and investigation took place immediately afterward, but it was a continuous attempt to develop any theory as to how this car float sank and how it rose.

Q. Then, as I understand it, you have a number of memoranda of interviews with witnesses or persons having a knowledge of the facts, which were taken about the same time you took the written statements of the survivors?

A. This case involved the sinking of a car float and its recurrent arising in the Delaware River; it is an extraordinary accident, and it has been the subject of a great deal of speculation in this port and in New York, and as recently as last Monday I was discussing the question of a car float performing in the fashion that it did. I have talked with a dozen people in that respect.

When we talk about memoranda, I doubt very much if I have anything of substance in writing, because of the fact that nobody has ever been able to explain to me, or to anyone else concerned in this case, how it happened; that is, exactly; we talk and we talk, but we never get anywhere in this case.

For example, at one time when the tug was on the railway I went aboard her myself with certain friends to see the damage.

I do not suppose that there is in my file any written memoranda, but I remember very definitely the circumstances and who the individuals were.

Q. That would be relevant, and you could call them as witnesses?

A. That is correct.

Q. Well, now, this procedure of your taking statements of witnesses, written and oral, immediately after the accident, is that a procedure which has been followed in every case of other accidents with this particular client? Have you done that in any other case?

A. It has been followed not only with these clients but in all Admiralty cases that are referred by underwriters to defend any legal liability which may arise.

Q. These statements are undoubtedly taken in most cases and the investigation is made before actual claims have been made, or suits begun?

A. I would say, generally, it is; of course, there are incidents where it is not expected there will be any litigation, and it is not referred until after litigation is started.

Q. Let me ask you this: this matter was referred to you, as I understand, by the underwriters? You state in your statement that you were "formally requested to defend whatever litigation"—was that from Taylor & Anderson or from the underwriters?

A. I would better say from both.

Q. From both?

A. I say that because there is in the owners an interest which may or may not be covered by the policy, and there is always that question.

Q. I presume that the underwriters maintain their own claims department, investigators, and so forth?

A. Oh, yes, they do.

Q. They did not participate in this investigation or preliminary taking of statements in any way, is that correct? At least, you haven't mentioned it.

A. They certainly took no statement. I don't want to say they didn't participate—they certainly were silent partners if they did anything, they were the ones who originally called me and said that they had policies outstanding under which there might be liability, and would the office conduct the investigation.

Q. That is, your office?

A. That is correct.

Q. Did they send somebody to help you in doing that?

A. No.

Q. No?

A. No.

Q. There may have been some of their representatives present at some time during your investigation?

A. I would seem to recall, when I talked with the survivors, there was a representative of the underwriters present, but he didn't take statements and did not participate actively.

Q. Mr. Fortenbaugh, did Taylor & Anderson have any claims against anybody to recover damages for the loss of the tug, or did they refer to you the question of whether they did have any such claim against any other party?

A. Concurrently with the defense of any possible claims against Taylor & Anderson, we investigated and collaborated on the possibility of Taylor & Anderson having a right of recovery against the Baltimore & Ohio Railroad, and it might very well also have been that our report was a factor in the settlement between Taylor & Anderson and the underwriters.

Q. That was part of your employment when this whole matter was referred to you jointly, as you said?

A. I would not draw a distinction between Taylor & Anderson and the underwriters—we were acting for both as their interests might appear.

Q. Of course, the underwriters were not interested in Taylor and Anderson's recovery against the Baltimore & Ohio?

A. They might have been subrogated because of coverage under the hull policy.

Q. Anyway, that was a part of your subject of investigation under which these statements were taken?

A. That is correct, and we reported to the underwriters that we saw no cause of action against the Baltimore & Ohio Railroad.

THE WITNESS: After communicating with my office, I submit the following supplemental data:

No litigation was actually started outside of the within action.

The widow of Captain Murray was in direct communication with me almost immediately after the accident, but finally appeared by counsel by letter dated March 19, 1943, and the case was settled on July 8, 1943.

In the matter of Dixon, letter from counsel was received on February 26, 1943, and settlement was made on September 26, 1944.

The Fidelity-Philadelphia Trust Company appeared on behalf of a relative of Andrew Benekos, but subsequently his claim was withdrawn.

There was apparently no appearance by counsel for the heirs of Ole Knudsen.

The statements of the survivors were signed on March 29, 1943.

Reported by

H. A. B. SCHWARTZ.

OPINION

Sur Exceptions to Interrogatories.

Before KIRKPATRICK, WELSH, KALODNER, BARD and GANEY, *District Judges.*

By KIRKPATRICK, *District Judge.*

The plaintiff's husband was one of five seamen who were drowned when the Tug "J. M. Taylor," capsized, on February 6, 1943. On November 26, 1943 she began this suit under the Jones Act to recover damages for his death, and thereafter filed 39 interrogatories, of which No. 38 is as follows:

"State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

The defendants Taylor & Anderson excepted to this interrogatory as "calling for privileged matter obtained in preparation for litigation."

Supplemental interrogatories, including a request for the production of "memoranda," and intended to elicit further information about the statements, were also excepted to. Mr. Fortenbaugh, counsel for the defendants, Taylor & Anderson, then filed a written statement and later testified by deposition, fully disclosing how and for what purposes the statements were obtained, which statement of counsel and testimony were, by stipulation, made part of the record, as a fact basis for the Court's ruling upon the question raised by the exceptions.

The question is whether a party, under the circumstances of this case, should be required to produce written statements of certain witnesses and memoranda of oral statements of others, and to disclose the substance of cer-

tain oral statements, all statements having been made to the party's attorney. The defendant has made no point of the plaintiff's procedure by interrogatories under Rule 33, and the propriety of the practice will therefore be assumed without deciding that question. The plaintiff might have elected to take depositions or, in the case of written statements and memoranda, to file a motion to produce under Rule 34. What is said in this opinion applies to all three forms of discovery.

The circumstances under which the statements were taken are as follows:

Taylor & Anderson is a partnership, operating seven tugs in and about the Port of Philadelphia. The partners were clients of Mr. Fortenbaugh's firm, which had been regularly representing them for a number of years though not upon any salary or general retainer basis. Taylor & Anderson had no claims department and no employees regularly charged with the duty of making investigations of any kind, their entire office force consisting of not more than three persons.

Four days after the accident both Taylor & Anderson and their insurance carriers got in touch with Mr. Fortenbaugh and requested him to "defend whatever litigation arose from the sinking in behalf of both the owners of the tug and the underwriters." Acting under this general instruction, Mr. Fortenbaugh interviewed the four surviving members of the crew, all employees of Taylor & Anderson, and took their written statements. Apparently these statements were taken immediately after a steamboat inspector's hearing on March 4 at which the witnesses had appeared and testified. The statements were signed on March 29. Subsequently he interviewed other persons believed to have some knowledge of various matters relating to the accident and in some cases made memoranda of what they told him.

At the time the written statements were taken the widow of one of the deceased seamen had been in direct

communication with Mr. Fortenbaugh and the widow of another had employed counsel who had written him a letter. No representatives of the other three, including the plaintiff, had appeared or been in communication with the defendants. Thereafter settlements were effected with the representatives of three of the deceased seamen. No claim has ever been made by any representative of the fourth. The plaintiff brought this suit some eight months after the witnesses' statements had been obtained.

Discovery of the contents of statements made by witnesses to a party investigating an accident which may involve legal liability is a matter as to which the Rules give the trial court the widest discretion. It is, of course, proper and desirable that the Court should let parties and their counsel know what considerations are deemed material in exercising the discretion so given, but to convert such general statements into rigid limitations would result in creating opportunities for evasion and destroy flexibility, which is a vital feature of federal discovery procedure. The guiding principle is the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process. The only limitation which can properly be placed upon the scope of such discovery is, as stated in National Bondholders Corporation v. McClintic, 99 Fed. (2d) 595, 599, "with regard to the taking of depositions for discovery or otherwise, a discretion is vested in the district judge to measurably control the otherwise freedom of the taking of depositions where 'for good cause shown' it will not, in the opinion of the district judge, promote the administration of justice in the particular case that they be taken."

In Stark v. American Dredging Co., 3 F. R. D. 300, cited and relied on by the defendants, this Court denied a motion to order the production of statements of witnesses taken in preparation for trial. We do not regard that decision as laying down a hard and fast rule that state-

ments obtained for that purpose are privileged, or exempt from production for any other reason. The Court said, "The limitation remains subject to the general liberal spirit of the rules; and 'the amount of protection properly required against an undue invasion of privacy will rest largely on the discretion of the court.'" Insofar as the next sentence of the opinion, which reads "A request to produce statements of witnesses taken by the other party in preparation for trial 'should be predicated upon good cause shown'", may be taken to cast upon the party seeking production of such statements the burden of showing exceptional or unusual circumstances, it is disapproved and the rule may be restated "Unless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."

In the Stark case, supra, the Court, we think, made it clear that the mere fact that the statements bear upon the possible legal liability of a party does not render them unreachable when litigation ensues, and we may amplify by saying that even the fact that the chief purpose of taking them was to prepare for litigation does not do so. In the present case, however, it should be pointed out that there were compelling reasons for taking the statements of the survivors, entirely unconnected with any anticipated suits for damages. One of the defendants' vessels had capsized and sunk in an accident of so unusual a nature as to be almost unique. Five lives had been lost. Even had there been no thought of possible liability, we doubt that any firm or owners would have failed to make a thorough investigation to determine the cause of the disaster and in so doing to take statements of witnesses. Not only was it important to them to ascertain whether their vessel was in all respects seaworthy and whether any of their employees were in any way responsible for what happened, but general safety considerations and a due regard for their obligations to the public, as well as their own interest, in view of the possi-

bility of unfounded or unfair criticism, demanded that the cause of the sinking be fully explored.

We think it proper to order the production of the written statements.

The same considerations apply to the facts learned by the defendant and coming to it in the form of oral statements of witnesses obtained by the attorney in the course of investigation. So far as these statements contain matters of fact, as distinguished from opinion, material to the issues involved they should be disclosed.

What has been said has to do with the Court's discretion. The question of privileged communications between attorney and client is another matter and is governed by rules of law. Of course, the Court may not, in exercising its discretion, transgress those rules. However, the mere fact that statements of third parties have been taken by an attorney does not of itself give rise to the privilege. In such case the lawyer is merely the medium through which his client becomes apprised of facts and his intention to transmit them to his client does not make the facts priviliged from disclosure in answer to interrogatories. We think that none of the statements made by witnesses in the present case are protected by any rule relating to privileged communications between attorney and client.

Insofar as the memoranda made by counsel consist of mere statements of fact made to him by witnesses they are in all respects equivalent to unsigned statements by the witnesses and are in no different category than the signed statements. In taking down what various witnesses told him about the case Mr. Fortenbaugh was acting primarily as an investigator. The liberal scope of discovery under the Rules displaces any concept of proprietary or quasi-proprietary interest which, under the prior practice, a party to a suit may have claimed in the fruits of his investigation. Of course, it may appear that the memoranda contain, in addition to facts, various matters which the plaintiff has no interest in or right to know. Discovery

should not be abused to become an instrument for obtaining knowledge of the opponent's theories of the case or the opinions, impressions or the record of mental operations of his attorney. As was suggested in the Stark case, supra, freedom in preparation for trial of a disputed issue under our judicial system contributes to satisfactory results, and there cannot be such freedom without some assurance of privacy within reasonable limits. If Mr. Fortenbaugh's record of the oral statements made to him by witnesses also contain notations of mental impressions, opinions, legal theories or other collateral matter these memoranda should be submitted by him to the Court. The Court will then direct disclosure to the opposite party of those portions of the memoranda containing statements of fact obtained from witnesses which it considers to be within the proper scope of discovery.

Defendant is directed to answer the 38th interrogatory, to produce the witnesses' written statements referred to in Mr. Fortenbaugh's statements to the Court, to state, in substance, any fact concerning this case which it learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda, and to produce Mr. Fortenbaugh's memoranda containing statements of facts by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to the opposing party.

ORDER.

(Filed September 5, 1945.)

And Now, to wit, this 5th day of September, 1945, this case having come before the Court upon Defendant's exceptions to the 38th interrogatory and supplementary interrogatories propounded by Plaintiff, argument having been had before the Court en banc, and the Court having filed its written opinion requiring Defendants to answer Plaintiff's interrogatory and to produce certain statements

and documents in connection therewith under Rules 33 and 34 of Civil Procedure for the District Courts of the United States, upon motion of Freedman, Landy and Lorry, Esqs., attorneys for Plaintiff, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants, John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, shall forthwith, answer Plaintiff's 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.

/s/ KIRKPATRICK,
U. S. D. J.

We hereby respectfully decline to obey the Order of the Court dated the 5th day of September, 1945.

JOHN M. TAYLOR,
Defendant.

GEORGE H. ANDERSON,
Defendant.

SAMUEL B. FORTENBAUGH, JR.,
Counsel and Agent for John M. Taylor and George H. Anderson, Individually and Trading as Taylor & Anderson Towing & Lighterage Company.

Dated: September 5th, 1945.

STATEMENT OF S. B. FORTENBAUGH, JR., ESQ.

(Filed September 20, 1945.)

S. B. Fortenbaugh, Jr., Esq., a member of this Court and of the firm of Shields, Clark, Brown & McCown, counsel for the Defendant, Taylor & Anderson Towing & Lighterage Company, makes the following statement for the record in the matter of Plaintiff's motion to hold Taylor & Anderson Towing & Lighterage Company in contempt for failure to answer Interrogatories:

On February 7, 1943, the Tug "J. M. Taylor" sank in the Delaware River with the loss of the lives of the following five members of the crew:

Alton Murray	Captain
Andrew Benekos	Fireman
Ole Knudsen	Deckhand
Alfonso Dixon	Cook
Norman Hickman	Fireman

The four survivors of the accident were:

Philip West	First Mate
Russell Savage	Deckhand
Charles Long	First Engineer
Walter Quillen	Assistant Engineer

On February 10, 1943, relator was formally requested to defend whatever litigation arose out of the sinking, on behalf of the owners of the Tug "Taylor" and the underwriters covering the said tug, all of whom had regularly been represented by the same attorneys in the past.

On March 4, 1943, an investigation was convened by the United States Steamboat Inspectors in the Custom House, testimony was taken of the four survivors aforesaid and Captain John M. Taylor, one of the owners of the Tug "J. M. Taylor." The examination was conducted publicly by a governmental examining officer and all known counsel and interested parties were invited to be present.

(Settlement has been made in various nominal amounts with all of the four survivors and with four out of the five of the deceased's legal representatives. The sole exception is the claim presented for the death of Norman E. Hickman as stated in the within litigation.)

On April 2, 1943, Louis F. McCabe, Esq., advised Defendant, Taylor & Anderson Towing & Lighterage Company, of his representation of George E. Hickman, father of Norman E. Hickman. Counsel communicated with Mr. McCabe, denying liability but expressing a willingness to confer after completion of investigation.

On November 26, 1943, the within action was commenced and citation issued, the Plaintiff then appearing by Freedman & Goldstein, Esqs.

Coincident with and continuously after February 10, 1943, counsel for Taylor & Anderson Towing & Lighterage Company have conferred, corresponded and negotiated with numerous counsel, as necessary in the defense of all manner of claims presented as the result of this accident. In the course of preparing for possible defense of these claims, including the within action, counsel for Taylor & Anderson Towing & Lighterage Company, have interviewed the four surviving members of the crew of the Tug "Taylor" and taken their statements. Counsel have also attended the survey of the tug, copy of which has been submitted to the Plaintiff. Counsel have conferred with a number of parties who have personal knowledge of the circumstances of the sinking and with general marine experts.

On November 27, 1944, one year after the institution of suit, thirty-nine interrogatories with numerous subdivisions were propounded by the Plaintiff to the Defendant. These have been answered in detail. On January 15, 1945, further interrogatories were propounded by the Plaintiff to the Defendant, including supplemental interrogatory 3 (a), requesting detailed information as to the investigations and records of the Defendant, Taylor &

Anderson Towing & Lighterage Company, particularly as the same relates to the investigation and defense of this case by this relator. Supplemental interrogatory 3 (a) has been answered to the effect that there are no records or investigations except as made by counsel as aforesaid, for his own use and in preparation for examining his witnesses at the trial, it being averred inter alia as follows:

> "Any and all statements taken were in the course of preparation by counsel for possible litigation. Defendants, Taylor & Anderson Towing & Lighterage Company, except to Interrogatory 3 (a) in that it requires the disclosure of entirely irrelevant, immaterial and inadmissible information in an attempt to obtain indirectly counsel's private files. The answering of the very minute and detailed interrogatory would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."

/s/ S. B. Fortenbaugh, Jr.
4/5/45

ORDER FOR CRIMINAL CONTEMPT.

(Filed September 5, 1945.)

AND Now, to wit, this 5th day of September, 1945, it appearing to the Court that Defendants, John M. Taylor and George H. Anderson, individually and trading as Taylor & Anderson Towing & Lighterage Company, and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, have neglected and refused, and continue to neglect and to refuse to obey the Order of this Court dated the 5th day of September, 1945, ordering them to answer the 38th interrogatory and supplementary interrogatories propounded by the Plaintiff in this case and to produce certain statements and documents in connection therewith under Rules 33 and 34 of the Rules of Civil Procedure,

Now, upon motion of Freedman, Landy and Lorry, Esqs., attorneys for Plaintiff, it is

ORDERED, ADJUDGED AND DECREED that John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., are in contempt of the Court, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshal for the Eastern District of Pennsylvania forthwith take John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., into his custody and commit them to the Philadelphia County Prison until such time as each of them purges himself of his contempt or until further order of the Court.

/s/ KIRKPATRICK,
U. S. D. J.

NOTICE OF APPEAL.

(Filed September 5, 1945.)

Notice is hereby given that John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., hereby appeal to the United States Circuit Court of Appeals for the Third Circuit from the sentence imposed upon them by the Court the 5th day of September, 1945 from the Order adjudging them to be in contempt of the Court dated the 5th day of September, 1945 and from the Order requiring them to answer certain interrogatories and to produce certain documents and statements in connection therewith under Rules 33 and 34 of the Rules of Civil Procedure for the District Courts of the United States.

JOHN M. TAYLOR, GEORGE H. ANDERSON,
and SAMUEL B. FORTENBAUGH, JR.,

By SAMUEL B. FORTENBAUGH, JR.

ORDER FOR SUPERSEDEAS IN RE CONTEMPT ORDER AGAINST JOHN H. TAYLOR, GEORGE H. ANDERSON AND SAMUEL B. FORTENBAUGH, JR.

(Filed September 5, 1945.)

WHEREAS, this Court entered an Order on the 5th day of September, 1945, adjudging John M. Taylor, George H. Anderson, and Samuel B. Fortenbaugh, Jr., in contempt for failure to comply with the Order of this Court, dated the 5th day of September, 1945, requiring the production of certain statements and the disclosure of certain information; and

WHEREAS, the Order committed John M. Taylor, George H. Anderson, and Samuel B. Fortenbaugh, Jr., to the Philadelphia County Prison until such time as each of them shall purge himself of his contempt; and

WHEREAS, John M. Taylor, George H. Anderson and Samuel B. Fortenbaugh, Jr., have, on the 5th day of September, 1945, filed a Notice of Appeal from the sentence, the Order adjudging them to be in contempt of the Court and the Order requiring them to answer certain interrogatories and to produce certain statements and documents, and

WHEREAS, John M. Taylor, George H. Anderson, and Samuel B. Fortenbaugh, Jr., desire to stay all proceedings in the above entitled cause until the termination of the Appeal;

NOW, THEREFORE, it is further ORDERED that execution upon the said Order of Contempt shall be stayed pending disposition of the Appeal in the United States Circuit Court of Appeals and all proceedings meanwhile to stay.

/s/ KIRKPATRICK,
U. S. D. J.

STIPULATION OF RECORD ON APPEAL.

(Filed September 20, 1945.)

And Now, to wit, this 18th day of September, 1945, it is Stipulated and Agreed by and between Freedman, Landy and Lorry, attorneys for Plaintiff, and Guckes, Shrader and Burtt, attorneys for Defendant, B. & O. Railroad Co., and Shields, Clark, Brown & McCown, attorneys for Defendant, Taylor & Anderson Towing & Lighterage Co., that one copy of each of the following shall constitute the record on appeal:

Complaint.

Answer of B. & O. R. R. Co.

Answer of Taylor & Anderson Towing & Lighterage Co.

Plaintiff's interrogatories to defendants, John M. Taylor, et al.

Plaintiff's interrogatories to defendant, B. & O. R. R. Co.

Answers of Baltimore & Ohio R. R. Co. to interrogatories.

Supplemental interrogatories propounded by plaintiff to defendants, Taylor & Anderson Towing & Lighterage Co.

Supplemental interrogatories propounded by plaintiff to defendant, B. & O. R. R. Co.

Answers of Taylor & Anderson Towing & Lighterage Co. to plaintiff's interrogatories.

Answers of Taylor & Anderson to plaintiff's original and supplemental interrogatories.

Further answers of Baltimore & Ohio R. R. Co. to interrogatories and answers to supplemental interrogatories.

Order of Court dated Jan. 15, 1945.

Motion by plaintiff for production of documents and Order of Court granting motion in part.

Opinion of the Court, by Kirkpatrick, J., Requiring defendant to answer certain interrogatories and to produce documents.

Order of Court requiring defendants and their counsel to answer certain interrogatories.

Refusal of defendants and Counsel to answer certain interrogatories.

Order of Court adjudging defendants, John M. Taylor and George H. Anderson and their counsel, Samuel B. Fortenbaugh, Jr., to be in contempt of court and committing them to prison.

Notice of appeal.

Order of Court granting supersedeas re: contempt order.

Statement of S. B. Fortenbaugh, Jr., Esq.

Testimony of S. B. Fortenbaugh, Jr., Esq.

FREEDMAN, LANDY AND LORRY,
By /s/ ABRAHAM E. FREEDMAN,

GUCKES, SHRADER AND BURTT,
By /s/ HOWARD BURTT,

SHIELDS, CLARK, BROWN & MCCOWN,
By /s/ S. B. FORTENBAUGH, JR.

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9035

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

vs.

JOH. M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as Taylor & Anderson Towing & Lighterage Co. and B. & O. Railroad Co.

JOHN M. TAYLOR, GEORGE H. ANDERSON, and SAMUEL B. FORTENBAUGH, JR., Appellants

PETITION FOR LEAVE TO APPEAR AS AMICUS CURIAE—Filed September 24, 1945

The Petition of Krusen, Evans and Shaw respectfully prays this Honorable Court that leave be granted to appear in the above entitled matter as Amicus Curiae and to submit a Brief and present oral argument to the Court upon the hearing of the cause before this Court.

The reason therefore are as follows:

1. The question to be determined in the case involves the interpretation of the Federal Rules of Civil Procedure.

2. The question is of great importance to all members of the Bar practicing before the Federal Courts.

3. Your Petitioners practice before the United States District Court for the Eastern District of Pennsylvania, and are vitally interested in the outcome of the case to be heard before this Court. The also represent clients who have an [fol. 78] equal interest in the proceedings before this Court.

4. Your Petitioners have communicated with Abraham E. Freedman, Esquire, and Samuel B. Fortenbaugh, Jr., Esquire, counsel for the respective parties in the case, and are authorized to state to the Court that neither counsel has any objection to the filing of this Petition and the granting of the same by this Court.

Wherefore, your Petitioners respectfully pray that the Court enter an order granting Petitioners leave to appear

as Amicus Curiae and to submit a Brief and to argue orally before the Court when the case is listed for argument.

Respectfully submitted, Krusen, Evans and Shaw, by —— ——.

[File endorsement omitted.]

[fol. 79] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER ALLOWING KRUSEN, EVANS & SHAW TO APPEAR AS AMICUS CURIAE—Filed September 26, 1945

It is hereby ordered and decreed this 26th day of September, 1945, that the Petition of Krusen, Evans & Shaw for leave to appear as Amicus Curiae in the above entitled matter is granted in accordance with the prayer of the Petitioners.

By the Court, Goodrich, C. J.

[fol. 80] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE—Filed September 27, 1945

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of Joseph W. Henderson respectfully shows to your Honorable Court as follows:

1. Your petitioner is a member of the bar of your Honorable Court and of the bar of the District Court for the Eastern District of Pennsylvania.

2. The decision of the learned District Court Judges in the above-entitled case is of great importance to your petitioner as a member of the bar of the District Court, and to

such clients as may be involved in litigation before the bar of that Court, now and in the future.

3. The decision involves an interpretation of Rules 26, 33 and 34 of the Rules of Civil Procedure in the District [fol. 81] Court.

Wherefore, your petitioner respectfully asks your Honorable Court to grant leave to file a brief in the aforesaid appeal, as amicus curiae.

(S.) Joseph W. Henderson, Petitioner.

[File endorsement omitted.]

[fol. 82] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER ALLOWING JOSEPH W. HENDERSON TO FILE BRIEF AS AMICUS CURIAE—Filed September 27, 1945

And now, to wit, this 27th day of September, 1945 upon motion of Joseph W. Henderson, Esquire, and upon consideration of the within petition,

It is hereby Ordered, Adjudged and Decreed that the petitioner may have leave to file a brief in the above entitled appeal, as amicus curiae.

By the Court. Goodrich, for the U. S. Circuit Ct. of Appeals for the Third Circuit.

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

[Title omitted]

ORDER ASSIGNING HON. ALBERT LEE STEPHENS FOR ARGUMENT —Filed October 1, 1945

And now, to-wit: this 1st day of October A. D. 1945, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

[fol. 84] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY OF ARGUMENT

And afterwards, to wit, the 1st day of October, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Herbert F. Goodrich, Honorable Albert Lee Stephens and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

[fol. 85] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title Omitted]

ORDER DIRECTING REARGUMENT

It is ordered that on November 10, 1945 there will be a reargument in the above entitled case before the Court en banc.

Goodrich, J.

October 12, 1945.

[fol. 86] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY OF REARGUMENT

And afterwards, to wit, 10th day of November, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert Lee Stephens, Honorable Albert B. Maris, Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 10th day of December, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 87] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9035

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, and Baltimore & Ohio Railroad Co.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR., Appellants

Appeal From the Order of the United States District Court for the Eastern District of Pennsylvania

Argued October 1, 1945. Reargued November 10, 1945

Before Biggs, Albert Lee Stephens, Maris, Goodrich, McLaughlin and O'Connell, Circuit Judges

OPINION OF THE COURT—Filed December 10, 1945

[fol. 88] By GOODRICH, Circuit Judge.

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania, which adjudged the appellants guilty of criminal contempt and imposed sentence therefor. The appellants are two clients and their lawyer. The basis of the contempt order was their refusal to answer a certain interrogatory propounded by the plaintiff's counsel in a personal injury suit. They took the position that what was asked for was beyond the proper scope of the discovery process under the Federal Rules. The court ruled against them and upon their disobedience

of the order adjudged them guilty of contempt. We, therefore, have the basis for appeal.[1]

The case tests the limits, if any, of the scope of the discovery procedure under the Federal Rules. A reversal of the judgment for contempt would of necessity compel us to decide that the District Court had gone too far. In considering the question we have the help of the host of District Court decisions upon the relevant paragraphs of the Rules. Some of them will be noted below. It is sufficient here to refer to the complete collection in Federal Rules Service, Chapters 26, 33 and 34. There is little

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[1] Rule 37(b)(1) provides: "Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court." Rule 37(b)(2) provides: "Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done * * * the court may make such orders in regard to the refusal as are just, and among others the following: * * * (iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders * * *." Appellate review of the final judgment of contempt involves power to review the civil element as well as the criminal and to grant relief affecting both. In Apex Hosiery Co. v. Leader et al., 102 F. (2d) 702 (C.C.A. 3, 1939) this Court decided that an order was interlocutory hence not appealable but specifically stated that contempt orders were subject to review and cited Union Tool Co. v. Wilson, 259 U. S. 107 (1922) as general authority for the procedure involved here. Mr. Justice Brandeis at page 111 of the latter opinion said, "The contemnor may obtain immediately a review by writ of error. * * * the Court of Appeals [could] * * * review that part which was civil as well as that which was criminal in its nature. [And grant] * * * relief which affected both * * *."

[fol. 89] appellate authority for the obvious reason that these orders are nearly always interloc-tury, R. D. Goldberg Theater Corp. v. Tri-States Theater Corp., 8 Fed. Rules Serv. 34.64, Case 1 (D.C. D. Neb. 1944) and cases there cited; the question seldom comes before a Circuit Court of Appeals.[2] The instant case had thorough consideration in the District Court. It was heard en banc by all the Judges of the District Court for the Eastern District of Pennsylvania and the thoroughly considered opinion by the Senior Judge was concurred in by all of his colleagues. — F. Supp. — (1945). The opinion in that Court premises that "The guiding principle is the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process." Starting from that premise the District Court concluded that the information sought to be elicited was relevant to the suit

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[2] The few appellate cases we have are remote from the central issue here and arose under the following circumstances: In Terminal Railroad Assn. of St. Louis v. Moore, 145 F. (2d) 128 (C.C.A. 8, 1944) while a personal injury action was pending in the Eastern District Court of Missouri a petition for writ of prohibition was filed in the Eighth Circuit Court of Appeals challenging an order of the District Court under Rule 34, giving plaintiff the right to inspect statements he had made to defendant concerning plaintiff's accident or injuries. Writ denied.

Hoffman v. Palmer, 129 F. (2d) 976 (C.C.A. 2, 1942), affirmed 318 U. S. 109 (1943) appeal by defendant from judgment for damages entered after jury trial. Error alleged on exclusion from evidence, of a statement signed by engineer driving the locomotive when the accident occurred. Reversed.

United States v. Smith, 118 F. (2d) 911 (C.C.A. 9, 1941) is even more remote in its collateral applicability. The case arose upon suit on a war risk insurance policy and the court ordered production of a document to refresh the memory of adversary's witness.

National Bondholders Corporation et al. v. McClintic, 99 F. (2d) 595 (C.C.A. 4, 1938) arose on mandamus proceedings against a district judge to vacate an order staying the taking of depositions of certain witnesses. Denied.

and that counsel for the defendants could be compelled to disclose it to the opposing party.

Such facts as are needed for an understanding of the controversy may be very briefly stated. A tug owned by Taylor and Anderson had capsized and five seaman met their deaths in the accident. Action was brought by the administrator of one of them under the Jones Act. Through her counsel she filed thirty-nine interrogatories. The [fol. 90] appellants answered all but one. This one is Number 38 which reads as follows:

> "(38) State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

There were some supplemental interrogatories including a request for the production of memoranda.[3] Mr. Fortenbaugh, the lawyer concerned, filed a written statement and later testified by deposition telling how and why the statements were obtained. So much for background of fact. Was the District Court correct in its law?

The parties are not entirely clear which of the Federal Rules is involved. The appellant says it is 34 or perhaps 33 and 34. The appellee in oral argument stated that he was proceeding under Rule 33. The District Court considered the plaintiff to be proceeding under Rule 33, although it said that the plaintiff could have elected to take depositions or, in case of written statements, have filed a motion to produce under Rule 4. Then the District Court stated that "What is said in this opinion applies to all three forms of discovery."

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[3] They read as follows:

"(1a) State whether you or your representatives have any knowledge or information as to whether any survey, examination or inspection was made of the Tug 'J. M. Taylor,' after it was raised from the Delaware River.

"2(a) State whether you or your representatives have any knowledge or information as to whether any oral or

[fol. 91] We take up this point first before getting to the main question. We think that 33 is the Rule involved and, for reasons which appear later, Rule 26 also. Plaintiff is not seeking to see an original document and copy or photograph it as provided in Rule 34. He is proceeding by interrogatory and, in connection with an interrogatory, wants the defendant to give him a copy of a memorandum. This is, in our opinion, concerned with Rule 33 rather than 34. But since the District Court, as above quoted, proceeded upon the theory that what is said applied to all the discovery Rules we are required to point out a difference in language in these Rules which we think must be given attention.

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written statements, records, reports or other memoranda were made concerning any matter connected with or arising out of the towing operation, sinking, salvaging and repair of the said tug and car float, the death of the deceased and any other matter related to the accident and incidents involved herein.

2(3a) If your answer to (1a) or (2a) be in the affirmative, state:

(a) the names and addresses of all persons or companies who were engaged or involved in the making of all such surveys, examinations and inspections;

(b) Whether any records, reports, statements or other memoranda were made or rendered in connection with said examinations within your knowledge or information;

(c) If you answer to subdivision (b) be in the affirmative, set forth:

(1) the nature of each and every such record, report, statement or other memoranda;

(2) the names, addresses, capacity and relationship of every person or company making or rendering each and every such report, statement, record or other memoranda;

(3) State the name, address, capacity and relationship of every person or company having possession or custody of each and every one of said records, reports, statements or other memoranda.

Rule 34 requires good cause to be shown.[4] The opinion of the District Court states that it amends its statement in Stark v. American Dredging Company, 3 F. R. D. 300 and that the rule be restated "Unless, under the circumstances of any particular case, the court is satisfied that the admin- [fol. 92] istration of justice will be in some way impeded, discovery will be granted when asked." We think this is the proper approach to the exercise of discretion under Rule 33. We do not think that it is correct under the language used in Rule 34. The requirement in Rule 34 for showing of good cause cannot be disregarded. Insofar as the remarks of the learned District Court apply to Rule 34, they went too far. Insofar as they apply to Rule 26 and Rule 33 they are approved. This point does not change the result in the instant case, or relieve us from facing the problem it presents. We pass on it because the District Court passed on it by applying its opinion to all the Rules

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(4) State the purpose for which each and every such record, report, statement or memoranda was made, the date it was made and the name, address, capacity and relationship of the persons or companies to whom made.

(5) State whether any records, reports, statements or other memoranda are ordinarily or have in the past been required in connection with an accident or disaster. If your answer be in the affirmative, then state what person or persons were ordinarily or have in the past been required to make or render any such records, statements, reports or other memoranda, to whom such records, reports, etc. were required to be made, and describe the nature of such documents.

(6) State whether the statements, records, reports or other memoranda rendered in this case were obtained in the same manner as in the past or if not, state in what way the practice was different."

[4] As to what precisely is meant by good cause the cases do not indicate with any degree of certainty: Marzo v. Moore-McCormack Lines Inc., 8 Fed. Rules Serv. 34.13, Case 1 (D.C. E.D. N.Y. 1945) Inch, D.J. "No attempt is made to show 'good cause' which means some plainly adequate reason for the desired production and inspection. Plaintiff's

which provide for discovery. We go on then to the difficult question involved in the appeal.

The important matters called for in the interrogatory are statements which the lawyer, acting in an investigating capacity, has taken from persons who have, or purport to have, knowledge about the facts which gave rise to the lawsuit. Two things are asked for. One is a copy of the statements which are in writing, whether signed or not, or merely memoranda; the other is that the lawyer reduce oral statements to writing and give his opponent a copy thereof.

As we approach the question we must discard some favorite craft notions of the advocate. We must discard, for instance, the concept that there is something close to a property right in the information which the lawyer digs up [fol. 93] about the client's case and has in his possession.[5] We must also discard the notion that questions from the

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mere statement that he is entitled to the relief sought is insufficient."; Heiner v. North American Coal Corp., 3 F. R. D. 63 (D.C. W.D. Pa. 1942) Gibson, D.J. "To entitle complainant to the order prayed he must show good cause for the order, must designate the documents desired, and must show that they are not privileged and are material to any matter involved in the action."; Leach v. Grief Bros. Cooperage Corp., 2 F. R. D. 444 (D.C. S.D. Miss. 1942) Mize, D.J. "It is difficult to lay down a definition of good cause that would apply to every particular case. There is a wide latitude." (Affidavit that defendant was preparing to take testimony of the same persons who had given the statements, showed good cause for inspecting the statements); Piorkowski v. Socony Vacuum Oil Co., 4 Fed. Rules Serv. 34.411, Case 1 (D.C. M.D. Pa. 1940) Watson, D.J. A party does not show good cause if he "has failed to show that the documents desired will in any way aid him in the preparation of his case, or that there is reasonable cause for believing that the contents of the documents concern this case."

[5] "Some lawyers also grumble saying that it is 'unfair' that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data." Hoffman v. Palmer, 129 F. (2d) 976 (C. C. A. 2, 1942), affirmed 318 U. S. 109 (1943).

other side can be fended off on the ground that the opponent's lawer is simply engaged in a fishing expedition." [fol. 94] These notions are hard to get rid of, but we take it that they are contrary to the idea back of this discovery portion of the Federal Rules. The premise taken by the District Court, quoted above, is not dissimilar to that of

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One finds here a sharp contrast between the statements of those who were engaged in writing the Rules and some of the District Judges who have the responsibility of applying the Rules when promulgated. Some, but not an overwhelming preponderance, of the judges have difficulty in believing that the Rules Committee really meant what it said. The following excerpts and citations show the clash of points of view:

"Hostility to 'fishing expeditions' before trial is a traditional and powerful taboo. To overcome its subtle influence requires more than logic and learning. Experience alone can effectively meet it." E. R. Sunderland, Foreword to Ragland, Discovery Before Trial, p. iii (1932).

"Adherence to the older method is due largely to the familiar fear of 'fishing expeditions.' It is true that fishing is likely to occur in oral examination, but when it is realized how little validity there is to the 'fishing' objection, and how much more definite the information obtained by oral examination is, there is no reason why this searching and flexible method should not normally be available for both depositions and discovery." "An appropriate pendant to it was the shibboleth—repeated to the point of nausea—that the court would not sanction 'fishing expeditions.'" J. A. Pike and J. W. Willis, The New Federal Deposition Discovery Procedure (1938) 38 Col. L. Rev. 1179 and 1436, containing a full discussion.

"Contrary to earlier limitations, the party may now engage in a 'fishing expedition.'" J. A. Pike, The New Federal Deposition-Discovery Procedure And The Rules of Evidence (1939) 34 Ill. L. Rev. 1.

"That the proceeding may constitute a 'fishing expedition' is not a valid objection to interogatories." A. Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure (1942) 41 Mich. L. Rev. 295.

In the same vein are Olson Transportation Co. v. Socony-Vacuum Oil Co., 8 Fed. Rules Serv. 34.41, Case 2 (D.C. E.D. Wis. 1944) and cases there cited; and Golden v. Ar-

Justice Holtzoff.[7] In speaking of discovery he says there are two guiding principles (page 70); "First, every party to a litigation is entitled to secure all evidence, information and documents germane to the issues, even if they are in possession of an adverse party. Second, such evidence, information and documents should be made available before the trial. The purpose is not only to facilitate the obtaining of evidence for use at the trial, but also to reduce the element of surprise to a minimum and shorten trials."

How much of a jolt this theory is to the practicing lawyer depends, in part, upon how far the practice with which he was familiar ~~before the Federal~~ Rules calls for something of the kind. The Rules probably go further than any State practice, but they are a much greater distance from the practice in some States than in others. See (1931) Note, 44 Harv. L. Rev. 633; "The Bill of Discovery Under Reformed Procedure."

We must start any discussion of the use of discovery in a particular case from the premise that the Rules are intended to go far in making information known by one party available to the other. Perhaps it is helpful if we start from a case which all would agree to be within the Rules and see how much further we are called to go here. Suppose the

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cadia Mutual Casualty Co., 6 Fed. Rules Serv. 34.41, Case 2 (D.C. N.D. Ill. 1942). Contra: For early statements antedating the new federal rules on this hoary question see Note 62 in Pike and Willis, The New Federal Deposition-Discovery Procedure (1938) 38 Col. L. Rev. 1179 and 1436. For federal decisions to the same effect, which arose later, see note 63 of the same article. More recent federal cases, contra, are: Walling v. R. L. McGinley Co., 4 F. R. D. 149 (D.C. E.D. Tenn. 1943); United Mercantile Agencies v. Silver Fleet Motor Express Inc., 4 Fed. Rules Serv. 34.11, Case 5 (D.C. W.D. Ky. 1941); Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., 3 Fed. Rules Serv. 34.41, Case 6 (D.C. W.D. Pa. 1940); Welty v. Clute, 29 F. Supp. 2 (D.C. W.D. N.Y. 1939). A case that attempts to steer a middle course between the opposing shores of opinion is Pierce v. Submarine Signal Co., 25 F. Supp. 862 (D.C. D. Mass. 1939).

[7] New Federal Procedure in the Courts, 1940, published by the American Bar Association.

plaintiff needs the information contained in an operating report of a particular department of a defendant employer for a particular day. Such document, we take it, could be called for as a matter of course under the Rules.[8] Does the

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[8] The extent to which records in the files of a business organization have been thrown open to an adversary's inspection is indicated by the following cases: Cohen v. Beneficial Industrial Loan Corp., 8 Fed. Rules Serv. 34.41, Case 8 (D.C. D. N.J. 1945) Smith, D. J. (Inspection of books and records granted in stockholder's suit); Roth v. Paramount Film Distributing Corp., 4 F. R. D. 302 (D.C. W.D. Pa. 1945) McVicar, D. J. (Inspection of records of box-office receipts granted in anti-trust action); Walling v. Belikoff, 3 F. R. D. 92 (D.C. S.D. N.Y. 1943) Hulbert, D. J. (Inspection of records by Administrator permitted in action to enjoin violation of Fair Labor Standards Act.); Walling v. R. L. McGinley Co., 4 F. R. D. 149 (D.C. E.D. Tenn. 1943) Taylor, D. J. (Discovery of documents relating to wages, hours and duties of employees, records, schedules etc. granted in action under Fair Labor Standards Act). And discovery has also been permitted against the same governmental agency which utilized it in the latter two cases. See Walling v. Richmond Screw Anchor Co. Inc., 7 Fed. Rules Serv. 34.42, Case 1 (D.C. E.D. N.Y. 1943) Moscowitz, D. J. (Names of allegedly underpaid employees in records of governmental agency not so privileged as to preclude discovery). Schultz v. Manufacturers & Traders Trust Co., 3 Fed. Rules Serv. 34.41, Case 3 (D.C. W.D. N.Y. 1940) Burke, D. J. (Inspection of corporate books of defendant granted in fraud action); Fishman v. Marcouse, 32 F. Supp. 460 (D.C. E.D. Pa. 1940) Bard, D. J. (Inspection of employee records of defendant company granted in Fair Labor Standards Action); Leimer v. State Mutual Life Assurance Co., 3 Fed. Rules Serv. 12b.31, Case 2 (D.C. W.D. Mo. 1940) Reeves, D. J. (Insurer ordered to produce copies of policies sued upon for inspection). An even wider latitude was granted in Gielow v. Warner Bros. Pictures, Inc., 26 F. Supp. 425 (D.C. S.D. N.Y. 1938) Conger, D. J. (Complainants' original manuscripts of stories and musical compositions opened to discovery by defendant in equity action).

At least one court has pointed out, however, that the inspection of corporate records is not all inclusive regardless

[fol. 95] demand in this case really go essentially further?[9] It is true that the defendants, through their lawyer, were diligent in going out and getting these statements before the plaintiff did. We have already indicated that this fact [fol. 96] does not prevent the other side from sharing the fruits of that diligence. The Rules sometimes speak of evidence. But whether the documents turn out to be com-

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of the nature of the suit: June v. George C. Peterson Co., 7 Fed. Rules Serv. 34.41, Case 1 (D.C. N.D. Ill. 1942) Holly, D. J. "I do not think Rule 34 requires the court in every case to order a corporate defendant to produce for the inspection of plaintiff, a stranger, all the records of its business affairs merely because plaintiff has filed a suit against it."

Where the documents do have some bearing, on the other hand, the courts have gone far in allowing inspection: The Prosperity Co. Inc. v. St. Joe Machines, Inc. 5 Fed. Rules Serv. 26b.31, Case 6 (D.C. W.D. Mich. 1942) Raymond, D. J. (Documents relating to date of conception or reduction to prior practice in patent case open to inspection); Conn. Importing Co. v. Continental Distilling Corp., 3 Fed. Rules Serv. 34.42, Case 1 (D.C. D. Conn. 1940) Hincks, D. J. (Copies of income tax returns not privileged against discovery); Fidelity & Casualty Co. Inc. v. Tarr Asphalt Trucking Co., Inc., 30 F. Supp. 216 (D.C. D. N.J. 1939) Fake, D. J. (Social Security records, Unemployment Compensation records and Income Tax records opened to discovery by plaintiff where defendant's books did not "furnish sufficient information as to whether or not the full amount of premiums [had] been paid * * *."). The examination of records has extended even to production of contracts with third parties: Moore v. C. A. Olsen Manufacturing Co., 8 Fed. Rules Serv. 34.41, Case 7 (D.C. N.D. Ohio 1944) (Inspection of subsidiary or collateral contracts with others granted in action for breach of contract or money had and received); Activated Sludge, Inc. v. Sanitary District of Chicago, 6 Fed. Rules Serv. 34.62, Case 2 (D.C. N.D. Ill., 1942) Lindley, D. J. (Defendant in patent case permitted to examine license contracts of plaintiff).

[9] Statements taken after accidents or injuries have been opened to inspection, and, again, as in the instance of the cases relating to discovery of an adversary's records (see f.n. 8) there has been no unreconcilable disagree-

petent as evidence themselves is not the test in discovery proceedings.[10] They may, nevertheless, contain statements [fol. 97] of fact which may be the source of other information which would be admissible at the trial. We think no distinction is necessarily drawn between oral and written statements. Doubtless the oral statements could not have been considered very important or they would have been

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ment among the courts: Eiseman v Pennsylvania R. Co., 3 F. R. D. 338 (D.C. E.D. Pa., 1944) Kalodner, D. J. "* * * I am of the opinion that the statements of the defendant's employees making reports as to the accident and submitted in the usual course of business following the accident are subject to the inspection of the plaintiff."; Rebheim v. Merritt-Chapman & Scott Corp., 2 F. R. D. 361 (D.C. S.D. N.Y. 1942) Bright, D. J. (Plaintiff permitted to examine pre-suit statements of officers of his vessel concerning his accident or injuries); Leach v. Greif Bros. Cooperage Corp., 2 F. R. D. 444 (D.C. S.D. Miss., 1942) Mize, D. J. (Inspection of plaintiff's own statement plus that of a witness, given to defendant by plaintiff's agent, permitted); Caroballo v. Export Steamship Corp., 3 Fed. Rules Serv. 34.411, Case 2 (D.C. S.D. N.Y. 1940) Hulbert, D. J. (Discovery of reports and statements obtained by adversary after accident and before suit, granted).

Inspection has even been granted to bills and vouchers relating to damages: Phoenix Insurance Co. v. Cline, 3 F. R. D. 354 (D.C. D. Mass., 1942) Ford, D. J.

An investigator's report in an action for malicious prosecution has also been held open to discovery: VanSant v. American Express Co., 8 Fed. Rules Serv. 34.41, Case 4 (D.C. E.D. Pa., 1944) Bard, D. J.

Documents pertaining to former litigation on the same subject matter have also been opened to inspection: E. W. Bliss Co. v. Cold Metal Process Co., 3 Fed. Rules Serv. 34.41, Case 1 (D.C. N.D. Ohio, 1940) Wilkin, D. J.

[10] "The examining party is not restricted to securing testimony that would be admissible in evidence at the trial. He may go further and obtain information that may be useful in securing such evidence." Holtzoff, New Federal Procedure And The Courts p. 75 (1940) published by American Bar Association. The same considerations that apply in Rule 26 apply in Rule 34 not to make admissibility

committed to writing, but if the Court sees fit to tell a party to write down what he remembers of a conversation we do not see why that recorded recollection may not be made available for what it is worth.

We have no desire to restrict the operation of the rules on discovery by the application of any notion of a semiproperty right in information one secures to use in a pending lawsuit against another. Nor do we balk at the notion that the hare may by discovery avail himself of the diligence of the tortoise. The policy back of all this has been discussed by experts in procedure in the Rules Committee and thoroughly debated there and elsewhere. It has become binding upon us by Supreme Court promulgation of the Rules. When such a policy has been adopted

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in evidence a test for laying bare the facts of the case before trial. Rosseau v. Langley, 9 Fed. Rules Serv. 34.41, Case 1 (1 C. S.D. N.Y. 1945) Goddard, D. J.; Walling v. Richmond Screw Anchor Co., Inc., 7 Fed. Rules Serv. 34.42, Case 1 (D.C. E.D. N.Y. 1943) Moscowitz, D. J. (Rules permit inspection of hearsay documents though in this case the court exercised its discretion not to permit inspection); Machrer v. New York Central R. Co., 3 Fed. Rules Serv. 34.412, Case 1 (D.C. E.D. N.Y. 1940) Moscowitz, D. J.; Blank v. Great Northern Ry. Co., 4 F. R. D. 213 (D.C. D. Minn. 1943) Sullivan, D. J. (While court says that the document need not be evidence for the party asking inspection it seems to intimate in one place, however, that the document is open to discovery because it could be used as evidence by defendant). As a corrollary to the principle that admissibility is not a test for pre-trial discovery, Hoffman v. Palmer, 129 F. (2d) 976 (C. C. A. 2, 1942), affirmed 318 U. S. 109 (1943) indicates that inspection of a document does not make it admissible in evidence.

Contra: Condry v. Buckeye S. S. Co., 4 F. R. D. 310 (D.C. W.D. Pa. 1945) Schoonmaker, D. J.; Galbreath v. Bond Stores, Inc., 8 Fed. Rules Serv. 34.11, Case 1 (D.C. W.D. Mo. 1944) Otis, D. J. (Dictum to the effect that documents not admissible in evidence as hearsay or irrelevant would not be subject to discovery under Rule 34); Poppino v. Jones Store Co., 3 Fed. Rules Serv. 34.41, Case 2 (D.C. W.D. Mo. 1940) Otis, D. J. (No inspection of documents not admissible in evidence for moving party though they relate to adversary's case.)

either by rule-making court or legislature judges should go along wih it. We must not do with the Federal Rules what our forebears on the bench did to the Field Code and those patterned upon it.

The thing which gives us great concern in this case is the impact of the rules for discovery when they affect the lawyer-client relationship. Here is an instance which was discussed at the argument and answered squarely by counsel for appellee in his reply brief. The Court put this case: If a lawyer is required to disclose the results of his investigation into the facts, suppose a witness called by the lawyer for his client, in the course of cross-examination, makes a statement inconsistent with a former statement made to the lawyer and put into possession of the other side through discovery process. May not this lawyer be called to verify the terms of the original statement and thus become a witness against his own client? Appellee says yes and frankly states, "We see no reason why there should be any criticism of this practice."

[fol. 98] The Court does not take such a light-hearted view of the situation. Professional tradition that it is undesirable that a lawyer should be both advocate and witness for his client finds expression in Section 19 of the Canons of Ethics.[11] The lawyer as a witness against his client must have seemed too remote a possibility to the framers of the Canons to be included, for it is not covered expressly. Such a situation certainly puts the lawyer into the position where he cannot show that undivided allegiance to the client's cause which the relationship postulates. Must he, then, withdraw from the case? If so, there seems to be offered an easy and tempting means for the advocate for one side to get rid of a dangerous adversary.

Admittedly the Rules do not expressly cover the exact question presented here. Obviously its further considera-

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[11] "Appearance of Lawyer As Witness For His Client. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

tion by the Advisory Committee has emphasized rather than solved the difficulties inherent in the question.[12]

The Advisory Committee in its Second Preliminary Draft of Proposed Amendments, pp. 39-40, states that, "such files and their contents are not absolutely privileged" and add that "such files can [not] be delved into in every case without restriction." Of its own proposed amendment it says, "the principal objection to it is that it does not establish any standard for the exercise of judicial discretion * * *" It concludes with a plea that, "If the members of the profession can formulate a general statement of the standard for exercise of discretion, the Committee will welcome it and give it careful consideration." District Courts have for varying reasons, or no expressed reasons at all, reached conclusions both ways.[13]

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[12] Second Draft of Proposed Amendments to Federal Rules of Civil Procedure by Walter P. Armstrong (1945) 31 American Bar Association Journal 497 "Only in one instance does the Committee seem to have been unable to come to a definite conclusion. In dealing with the extent to which one may delve into an adversary's investigation file and examine statements of witnesses, photographs, maps, etc. procured in preparation for trial the Committee seems to have taken the counsel of despair."

[13] An examination of the District Court decisions in general accord with our view indicates the undefined extent and uncertain nature of their rationale. The cases are led by McCarthy v. Palmer, 29 F. Supp. 585 (D.C. E.D. N.Y. 1939), affirmed 113 F. (2d) 721, cert. den. 311 U.S. 680. Moscowitz, D. J.; the relevant language there is: "In connection with the particular evidence in question, a further problem was brought into focus, namely, the extent to which the new Rules of Civil Procedure permit the examination by one party of affidavits and similar materials secured by the other party by independent investigation incident to the preparation of the case for trial. While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances no such result

[fol. 99] Our consideration of the problem leads us to the conclusion that there is more in the exception of "privilege" than has been so far developed. First, on this point, let us look at the language of the Rules. Rule 26 (b), on the subject of depositions, says that the deponent may be examined "regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending [fol. 100] action." Rule 34 permits the ordering of pro-

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was intended." It should be noted that the principal issues in that case related to damages and the question whether inspection of a document made it admissible in evidence. Since affirmance on its salient issues this case has been questioned by its own circuit court of appeals in Hoffman v. Palmer, 129 F. (2d) 976, 996, affirmed 318 U.S. 109 (1943), which indicated a different view on the question of inspection making a document admissible. See Note in (1940) 53 Harv. L. Rev. 882 for further criticism. It has further been explained on its damages issue in Hetrick v. Reading Co., 39 F. Supp. 22 (D.C.D. N.J. 1941). Two other cases rely entirely on its authority to reach a similar conclusion: Piorkowski v. Socony Vacuum Oil Co., 4 Fed. Rules Serv. 34.411, Case 1 (D.C. M.D. Pa. 1940) Watson, D.J. and Courteau v. Interlake Steamship Co., 4 Fed. Rules Serv. 34.411, Case 2 (D.C. W.D. Mich. 1941). Two other cases also rely on it as precedent: In Zeoli v. New York Central R. Co., 8 Fed. Rules Serv. 34.411, Case 3 (D.C. E.D. N.Y. 1945) Kennedy, D.J. the court is more influenced by the fact that the documents did not "come under the regular entry rule" than by the factor of preparation for trial. In Byers Theaters v. Murphy (D.C. W.D. Va. 1940) Barksdale, D.J. the inspection was opposed by defendant only on the grounds of irrelevancy and confidential trade secrets. The case of Stark v. American Dredging Co., 3 F.R.D. 300 (D.C. E.D. Pa. 1944) Kirkpatrick, D.J., is also often cited. But in a later decision the same judge supported by the District Court en banc reached an opposite result. Hickman v. Taylor & Anderson is the later decision referred to, and that is the case out of which the present appeal has grown Nelson v. Reid, 4 F.R.D. 199 (D.C. S.D. Fla. 1944) Holland, D.J. cites the Stark case as its principal authority. Midland Steel Products Co. v. Clark Equipment Co., 9 Fed. Rules Serv. 34.411, Case 1 (D.C. W.D. Mich. 1945) Raymond, D.J. cites almost all the cases just discussed,

duction, inspection etc., of documents and other things "not privileged."

Now we get into deep water. Rule 33 (interrogatories), which the Committee Notes say incorporates Equity Rule 58, is by its terms applicable only to adverse parties, not their agents, nor, a fortiori, their legal counsellors. If the party is an association, corporation, or partnership,

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McCarthy, Courteau, Stark, Nelson as "the weight of authority" for the same view. Topolinsky v. Palmer, 8 Fed. Rules Serv. 34.411, Case 2 gives no citations at all in reaching a similar result. And Condry v. Buckeye S.S. Co., 4 F.R.D. 310 (D.C. W.D. Pa. 1945) Schoonmaker, D.J. reached the same result but on the ground that the documents involved were not "evidence material to any matter involved in the action" and were "not evidence at all * * *".

The cases apparently contra are equally cloudy in definition and limited in scope: Thus documents constituting part of preparation for trial have been held open to discovery unless privileged, or not specifically identified, or not material to the controversy, or in someone else's possession, but not immune from inspection merely because they are part of the preparation for trial. Rossean v. Langley, 9 Fed. Rules Serv. 34.41, Case 1 (D.C. S.D. N.Y. 1945) Goddard, D.J. (dictum); Farr v. Delaware, Lackawanna & Western R. Co., 8 Fed. Rules Serv. 34.35, Case 1 (D.C. S.D. N.Y. 1944) Hulbert, D.J. "The plaintiff is entitled to see any report which was made by any officer or employee made in the regular course of the performance of his duty in relation to the happening of the accident out of which this action arises. But any statement or other information acquired by or through the direction of counsel after notice of the accident and in furtherance of his preparation for the defense of the action, may be regarded as confidential, unless and until the same is presented to the court for examination and a specific ruling made with respect thereto."; Blank v. Great Northern Ry. Co. 4 F.R.D. 213 (D.C. D. Minn. 1943) Sullivan, D.J. "In the present case the statement was given by the adverse party, the plaintiff to the defendant's Claim Agent. There appears to be no reason for the protection of such statement as a privileged communication from the inspection thereof by the plaintiff."

special provision is made. On Rule 33 alone interrogatories were not authorized to be directed to Mr. Fortenbaugh, and he certainly could not be in contempt for failing to answer an interrogatory not authorized by the Rules.

But there is more to the story. Rule 26 (depositions pending action) allows the testimony of "any person, whether a party or not" to be taken by deposition "upon oral examination or written interrogatories." To have interrogatories addressed to one not a party to the litigation, therefore, the procedure must be under Rule 26, not Rule 33.

As already stated, Rule 26 has a privilege limitation upon the scope of examination. Rule 33 says nothing about privilege. We think that Rule 33 is subject to the same privilege limitation as Rules 26 and 34. One reason for so [fol. 101] concluding is that Rule 26 covers interrogatories as well as oral testimony, and the privilege Rule stated in 26 carries over to 33. Another reason is that we cannot believe that such omission was intended. We can see no logic in leaving it out of 33 and putting it in 26 and 34. And we cannot think a rule as old as that of privilege is to be lightly thrown overboard.

So now we have, upon examining the language of the Rules, pushed Mr. Fortenbaugh out from under Rule 33 but kept him in under Rule 26. We have the scope of examination under all three Rules subject to the limitation of privilege.

The heart of the case is what we put into that concept. The Rules, so far at any rate, do not give us the formula. Inspection of the dictionary upon the point proves stimulating to ideas, but not resolving of difficulties.

We do not doubt that privilege as used in the Rules includes all that is comprehended in the rule of testimonial exclusion of confidential statements made by a client to his lawyer.[14] That would not exclude the material asked for here, since the statements the lawyer got and interrogatories

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[14] Wigmore on Evidence (3rd Ed.) § 2292. "*(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose; (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.*"

asked for were not from the client but third parties. Such are not included in the rule of exclusion.[15] There are decisions which have extended the privilege to other situations.[16] These tend to show a feeling on the part of judges that "privilege" as the term is used in the Federal Rule and [fol. 102] "privilege" as one finds the term in the law of evidence as a ground for excluding testimony are not identical. We agree that they are not, but that fact does not take us very far along the road to settlement of our problem.

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[15] Wigmore on Evidence (3rd Ed.) § 2317.

[16] The English experience with discovery stems from O. 31,RRI-29. While the statute is not worded as our new Federal Rules are, the general analysis of that statute is helpful. Digest of The Law of Discovery with Practice Notes by Judge Bray (2nd ed.) p. 24 states, "The rules now provide that discovery is not to be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs • • • But in addition to this protection there are four grounds upon which it can be resisted as of right, (a) as being criminatory or penal, (b) as being within the doctrine of legal professional privilege, (c) as disclosing the party's evidence, (d) as being injurious to public interests." We do not mean to imply that the same four grounds can be used to resist discovery under the Federal Rules of Civil Procedure, but we do suggest that this serves as a convenient analytical pattern to separate the various types of cases that are loosely grouped under privilege in our own country.

Using the convenient breakdown so provided, we find many extensions of privilege in the American cases which seem to belong to the class delineated by Judge Bray as "injurious to public interests." These include: Bowles v. Ackerman, 4 F. R. D. 260 (D. C. S. D. N. Y. 1945) Bright, D. J. (O. P. A. served with subpoena duces tecum may not refuse to produce documents obtained from defendant on ground that the documents are considered confidential under Emergency Price Control Act); VanSant v. American Express Co., 8 Fed. Rules Serv. 34.41, Case 4 (D. C. E. D. Pa. 1944) Bard, D. J. (Reports of investigation into forgery granted inspection in action for malicious prosecution despite claim that public interest required nature

We are clear in our own minds, however, that "privilege" as used in the Rules comprehends the material asked for in the interrogatory which is the foundation of this proceeding, namely, memoranda of talks with witnesses, signed statements made by witnesses, the lawyer's recollection of talks with witnesses. Our difficulty comes, not in any lack of confidence in our judgment upon the point, but in seeking [fol. 103] a phrasing of our conclusion to give it wide enough scope without going too far. For instance, one is tempted to say that the lawyer's files are impregnable against any inquiry from outside. But that depends upon what the lawyer puts in them. A piece of a machine which has hurt someone, a document needed to show a fact, many things required in a lawsuit find their way from client's hands to lawyer's file and are not to be concealed until the day of trial for that reason. But here we are dealing with intangible things, the results of the lawyer's use of his tongue,

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and method of investigation to be secret. Court said secret or confidential elements of report could be preserved by appointment of a master); Walling v. Comet Carriers, Inc., 7 Fed. Rules Serv. 34.42, Case 2 (D. C. S. D. N. Y. 1944) Caffey, D. J. (No discovery of documents in custody of government when privileged because of regulation of Secretary of Labor prohibiting disclosure except with his consent). To same effect where order of Attorney General relating to documents of Department of Justice involved: United States ex rel. v. Bayarsky v. Brooks, 51 F. Supp. 974 (D. C. D. N. J. 1943) Fake, D. J. Cf. Walling v. Richmond Screw Anchor Co., Inc., 7 Fed. Rules Serv. 34.42, Case 1 (D. C. E. D. N. Y. 1943) Moscowitz, D. J. "This court refuses to go so far as to decide that any and all records of a governmental agency are of a confidential nature and therefore privileged." Names of allegedly underpaid employees not so privileged. Western States Machine Co. v. S. S. Hepworth Co., 4 F. R. D. 766 (D. C. E. D. N. Y. 1941) Abruzzo, D. J. In a patent case "the discretion of the court should be exercised to prevent disclosure of trade secrets in advance of the trial"; Byers Theaters, Inc. v. Murphy, 3 Fed. Rules Serv. 34.41, Case 5 (D. C. W. D. Va. 1940) Barksdale, D. J. "Nor do I think that the prices, as shown by the contracts, partake of the nature of trade secrets or are confidential to such an extent as to give them any peculiar sanctity * * *".

his pen, and his head, for his client. This was talked about as the "work product of the lawyer" in the argument of the case. This is a phrase which seems pretty well to describe what we are after, though we hesitate to adopt it as a label for our concept for fear that it may contain implications not now apparent to us. It does with fair accuracy describe what we are excluding here under the term privilege. It seems likewise to be about what is represented by the English law though the difference in phraseology of the rules makes reference only moderately helpful.[17]

The reason for this frank extension of privilege beyond testimonial exclusion rests on the same foundation that the rule of evidence does. It is the same foundation upon which we base the immunity of the judge for his official acts in that capacity. It is found again in the non-liability of judge, counsel and witnesses for defamation for what they say in the trial of a lawsuit. In none of these instances is the immunity based on the convenience of the individual judge, lawyer or client. It is rather, a rule of public policy, and the policy is to aid people who have lawsuits and prospective lawsuits. Those members of the public who have matters to be settled through lawyers and through litigation should be free to make full disclosure to their advisers[18] and to have those advisers and other persons concerned in the litigation free to put their whole-souled efforts into the [fol. 104] business while it is carried on.[19] The soundness of this policy is not capable of laboratory demonstration. Enunciated and applied as it necessarily is by members of the guild which derives incidental benefit from its application, it is open to the gibes of the cynical. We believe it is

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[17] See authority cited in note 16.

[18] Wigmore (3rd Ed.) § 2291.

[19] The Restatement speaks of this policy in several places, thus Restatement, Torts § 586 Comment (a): "a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege [of defamation in judicial proceedings] is absolute." In Restatement, Torts § 637 Comment (a) the same view is expressed with respect to absolute privilege of attorneys in disparagement of property during judicial proceedings.

sound policy; we know that it is irrefutably established in the law. That the principle finds application in the facts presented to us on this appeal we are all thoroughly convinced.

The order of the District Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

[fol. 105] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 9035

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, and Baltimore & Ohio Railroad Company

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR., Appellants

Present: Albert Lee Stephens, Maris, Goodrich, McLaughlin and O'Connell, Circuit Judges.

JUDGMENT—Filed December 10, 1945

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this court.

By the Court, Goodrich, Circuit Judge.

December 10, 1945.

[File endorsement omitted.]

[fol. 106] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 106a] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—April 22, 1946

On consideration of the motion for leave to proceed *in forma pauperis* herein,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 107] SUPREME COURT OF THE UNITED STATES

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ORDER ALLOWING CERTIORARI—May 27, 1946

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order of April 22, 1946, denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.